**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE DISTRICT OF DELAWARE**

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| In re:<br><br>WASHINGTON MUTUAL, INC., *et al*.,[1]<br><br>Debtors. | Chapter 11<br><br>Case No. 08-12229 (MFW)<br><br>Jointly Administered<br><br>**Re: Dkt. No. 7906**<br><br>**Hearing: June 29, 2011 at 10:30 a.m.** |

**AURELIUS CAPITAL MANAGEMENT, LP'S OBJECTION TO MOTION OF THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS FOR AN ORDER COMPELLING PRODUCTION OF DOCUMENTS**

Aurelius Capital Management, LP ("Aurelius"), on behalf of certain of its managed entities[2] that are creditors of the above-captioned debtors and debtors in possession (collectively, the "Debtors"), by and through its undersigned counsel, hereby submits this objection to the motion (the "Motion to Compel") (D.I. 7906)[3] of the Official Committee of Equity Security Holders (the "Equity Committee"), filed on June 15, 2011, for an order compelling Aurelius to produce certain categories of documents, and in support thereof respectfully states as follows:

## PRELIMINARY STATEMENT

1. The Equity Committee has been afforded ample time and resources to conduct its examination. The undisputed facts confirm that Aurelius *did nothing wrong*. The Motion to Compel thus serves no legitimate purpose. It is merely part of a shakedown operation

[1] The Debtors are (i) Washington Mutual, Inc. and (ii) Washington Mutual Investment Corp.

[2] The trading in question involved three separate funds managed by Aurelius Capital Management, LP, each with its own trading history and one of which did not even commence operations until February 2010.

[3] Capitalized terms not otherwise defined herein shall have the meaning ascribed to such terms in the Motion to Compel.



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– a cynical effort to extort by making baseless accusations of insider trading in a highly charged atmosphere and by imposing many millions of dollars of loss via expense and delay on Aurelius and many others.

2. Aurelius takes its legal obligations deadly seriously. Aurelius has scrupulously, indeed compulsively, complied with the law in this instance. Aurelius prizes its integrity and will protect it at all costs. Aurelius's integrity is not for sale, nor will it allow expedience or compromise to leave a stain on its reputation. Aurelius did *not* support the recent failed settlement, and it will *never* agree to pay the functional equivalent of protection money. As seasoned investors who make money the old fashioned way – through hard work and meticulous analysis of publicly available information – Aurelius abhors those who would circumvent the rules and illegally trade with inside information. But it would be abhorrent as well to allow baseless insinuations of insider trading to turn into a witch hunt – inflicting many millions of dollars of damages on Aurelius, its underlying investors, and countless other parties in interest, and potentially placing a grave cloud over the reputations of responsible and scrupulous investors whose businesses depend on the willingness of their clients to repose trust in them.

3. The Equity Committee's campaign of vilification is not just baseless – it is mendacious, unethical and dangerous. Unless stopped *now*, the Equity Committee's irresponsible conduct threatens to delay these cases indefinitely and to set a precedent that would invite out-of-the-money interests to wreak havoc in every major bankruptcy for years to come and upend long-established and recognized practices that have facilitated consensual resolutions in many chapter 11 cases.

4. As the Court knows, when the Equity Committee had reached a tentative settlement in late May, it was prepared to acknowledge that its investigation had uncovered no wrongdoing.[4] Now that it has returned to litigation mode, the Equity Committee blithely reverses course and asserts that charges of improper trading by Aurelius are "well-founded." Motion to Compel at 2. However, as we demonstrate in detail below, this statement – like so many others in the Motion to Compel – is vexatious and untrue. The Motion to Compel is predicated on fundamentally distorted and misleading accounts of both the facts and the law.

5. Following this Court's January 2010 confirmation opinion, the Equity Committee sought Rule 2004 discovery to determine whether facts existed to support objector Nate Thoma's speculative suggestion that the Settlement Noteholders[5] improperly traded in the Debtors' securities based on material nonpublic information. On February 8, 2011, the Court ordered discovery in certain discrete categories. Aurelius complied by producing more than 12,000 pages of documents, virtually all by March 21, 2011. The Equity Committee did not then raise *any* question about the scope of Aurelius's document review, the quantity and quality of its production, or its redactions or privilege assertions.

6. Weeks later, on May 4, 2011, Aurelius Managing Director Dan Gropper sat for a day-long deposition ("Gropper Dep.") (transcript attached as Ex. 2 to Motion to Compel). Mr. Gropper described the great care Aurelius takes to prevent improper trading; the limited circumstances and time periods in which Aurelius was provided with nonpublic information; and how *the Debtors themselves agreed to and implemented an explicit safe harbor*

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[4] *See* May 24, 2011 Hearing Transcript at 42-43 (excerpts attached as Ex. A to Aurelius's response to the Equity Committee's Motion to Shorten (D.I. 7925)).

[5] The Settlement Noteholders consisted of Aurelius, Appaloosa Management, L.P., Centerbridge Partners, L.P., and Owl Creek Asset Management, L.P.

*procedure in the confidentiality agreements between the Debtors and Aurelius* to ensure that, at the conclusion of these restricted periods, all such material information provided to Aurelius would be publicly disclosed.

7. Although Mr. Gropper's testimony would have more than satisfied a responsible bankruptcy fiduciary, the Equity Committee instead now seeks tactical advantage by pressing burdensome and irrelevant new discovery that would not only effectively reverse this Court's limitations but actually expand upon the Equity Committee's original requests.

8. Fortunately, the facts uncovered by the Equity Committee over the past five months allow all reasonable parties and the Court to confirm, without the need for any additional discovery, that the trading practices and confidentiality arrangements implemented in these cases not only were proper, but represent a model of how unofficial creditor groups or other parties in a complex chapter 11 reorganization should deal with these matters. The *undisputed* facts show:

- During the first of two confidentiality periods in 2009, Aurelius negotiated a detailed confidentiality agreement with the Debtors governing its conduct while in possession of material nonpublic information. Consistent with the agreement, Aurelius constructed and maintained a rigorous ethical wall to ensure that no material nonpublic information provided to an Aurelius employee would be shared with any individuals involved in trading decisions. The Equity Committee has reviewed the confidentiality agreements, the documents pertaining to the ethical wall, and Aurelius's trading records and does not even *suggest* that these restrictions were breached in any way.

- During the second of two confidentiality periods, Aurelius did not implement an ethical wall, but instead *refrained entirely from trading*. Again, the Equity Committee has seen the relevant trading information, *admits* that Aurelius did not trade, and has not even suggested that Aurelius engaged in improper conduct of any sort while the restriction was in place.
- Most significantly, at the conclusion of each of the two restricted periods, the confidentiality agreements required the Debtors to *publicly disclose all material nonpublic information they had shared with Aurelius*. Aurelius specifically bargained for these disclosure provisions, and the Debtors, with the advice of experienced and well regarded counsel, complied with those obligations through disclosures in their monthly operating reports. On each occasion, the Debtors, with counsel's advice, determined that they were *not* obligated to disclose a summary of settlement negotiations to which Aurelius and others had been privy – since, among other things, the negotiations had broken off unsuccessfully with the parties far apart; the information contained in proposals was stale (as there was no assurance the same terms would be available in a future negotiation); and therefore no nonpublic settlement information conveyed to Aurelius during the restricted period was material. The Debtors' contractually mandated public disclosures of all information that *was* material provided a crucial safe harbor for Aurelius and other parties, permitting them to participate in settlement discussions without becoming permanently restricted from trading. Only after the Debtors made their disclosures and Aurelius consulted with its own securities counsel to confirm the Debtors' judgment did Aurelius resume unrestricted trading. *The undisputed record of these*

*events shows that these procedures could not have been more properly developed or implemented.*

9. Recognizing that its investigation yielded *nothing*, the Equity Committee now grasps for a new theory, with no basis in either securities law or recognized bankruptcy practice. Notwithstanding the absence of any evidence that Aurelius violated *any* obligation to the Debtors, the Equity Committee asks the Court to reject the customary safe harbor procedure employed by the Debtors and, long after the fact, second-guess the contemporaneous judgment of the Debtors and their experienced counsel that settlement proposals made and rejected during the restricted periods had become stale and immaterial, and therefore did not need to be disclosed.

10. The Equity Committee's new theory is dangerous and misguided. If non-fiduciary parties are to be encouraged to participate in the bankruptcy process, they need to be able to rely upon predictable procedures and to know that participation in discussions aimed at moving the case forward will not, if settlement talks fail, restrict them for the duration of the case. If parties cannot rely on the good faith judgment of well represented debtors in making any necessary "cleansing" disclosures, they will decline to participate in confidentiality agreements – to the detriment of the central chapter 11 goal of fostering consensual resolutions. This practice has been used to attempt to negotiate settlements among parties in countless bankruptcy cases for decades. Rejecting it would undermine the ability to negotiate settlements in major bankruptcies – including, for example, the current Lehman Brothers cases, where Weil Gotshal, as debtors' counsel, has used a similar mechanism to foster negotiations among the major constituencies. A judicial rejection of this procedure would have the gravest of consequences.

11. Key to successfully implementing this type of procedure is the heretofore widely understood securities principle that the stale details of unsuccessful negotiations are simply not material. Any other rule would either require disclosure of even the most inchoate negotiations (which would chill principals from making offers in the first place) or require those hearing the offers to remain restricted indefinitely (which would discourage *their* participation). Applying such a rule *retrospectively* in these cases would be particularly unfair – and would mean that *countless parties* that were privy to failed negotiations at various stages of these cases and then traded – ranging from other noteholders to holders of bank bonds, preferred and common stock, and litigation tracking warrants ("LTWs") – could well be deemed to have traded improperly.

12. Most fundamentally, it is irresponsible to suggest that Aurelius engaged in "inequitable conduct" by trading after it indisputably, in good faith, satisfied its contractual obligations, and the confidentiality periods and related restrictions had *terminated*. This would penalize Aurelius for conduct that could not support a securities law violation, since it owed no continuing duty to the Debtors. Indeed, it was the Debtors who under the confidentiality agreement had the obligation to make disclosure of any shared material nonpublic information. And *the Debtors themselves*, after consulting their own experienced securities counsel, determined that unsuccessful settlement negotiations during the restricted periods did not constitute material nonpublic information.[6]

[6] Indeed, if the Debtors failed to disclose all material nonpublic information shared with Aurelius and numerous other parties in interest, that would constitute a breach of the Debtors' contractual obligations that would give rise to an administrative claim against the estates for any damages caused thereby, requiring huge cash reserves in connection with plan confirmation, as well as claims against the Debtors' officers and professionals. *See Objection of Aurelius Capital Management, LP to Confirmation of the Modified Sixth Amended Joint Plan of Affiliated Debtors*, dated June 22, 2011, ¶¶ 56-60 (D.I. 7951).

13. Most important for the purposes of the present motion, it is apparent that there are actually no remaining factual disputes requiring discovery. Aurelius produced the settlement proposals and other documents provided to it during the confidentiality periods. Mr. Gropper candidly testified as to what he learned during the restricted periods about the parties' settlement proposals and other information about the Debtors. The Equity Committee thus has ample information to present at confirmation its novel theory of improper trading, baseless as it is, without imposing the burden of endless new discovery and triggering the need for parallel investigations of virtually every major party in the cases.

14. In short, the Motion to Compel should be denied because (1) the Equity Committee cannot make out a *prima facie* case that Aurelius engaged in *any* misconduct, rendering any further discovery pointlessly burdensome; (2) the Motion to Compel is based on objections to Aurelius's original production that should have been raised months ago; and (3) the Motion to Compel is a *sub rosa* attempt to reargue this Court's ruling on the appropriate scope of discovery. The Court should deny the Motion to Compel and end this meritless and malicious detour.

## BACKGROUND

### The Genesis of the Current "Investigation"

15. On March 12, 2010, the Debtors announced that they had reached a three-way understanding to resolve all disputes among the Debtors, the FDIC, and JPMorgan Chase Bank, N.A. ("JPM"). This understanding was embodied in a plan of reorganization (as subsequently modified, the "Plan") and a Global Settlement Agreement ("GSA") that were originally filed on March 26, 2010 and subsequently renegotiated and modified several times.

16. On November 19, 2010, Mr. Nate Thoma, a *pro se* Washington Mutual securityholder, filed an objection to the Plan (the "Thoma Objection") (D.I. 6058). In his

unsuccessful attempt to have the Settlement Noteholders' votes designated, Mr. Thoma speculated that the Settlement Noteholders must have traded on nonpublic information learned during settlement talks. *See id.* ¶¶ 9-30. Nearly all of Mr. Thoma's diatribe amounted to the contention that if highly regarded, seasoned investors in distressed credits made money doing so, it must have entailed insider trading. One of the few specifics Mr. Thoma offered was that "the near-exponential run up in the price of the WAHUQ security [i.e., the PIERS] ca. January, 2010" occurred at a time when "*there was no particularly positive public information.*" *Id.* ¶ 16 (emphasis added). In fact, to the contrary, the jump in price was the direct result of the highly positive *public disclosure* the Debtors had just made in its Monthly Operating Report filed on December 30, 2009, concerning the expected amount of its tax refund. (Excerpts attached as Ex. A to the Declaration of Jeffrey S. Trachtman filed contemporaneously herewith ("Trachtman Decl.")). It is bad enough that Mr. Thoma, an amateur investor, would so fundamentally misrepresent the state of public information in his objection while making grave accusations against Aurelius and other seasoned investors. But it is all the more irresponsible and mendacious for the Equity Committee – with full knowledge of the import of the Debtor's December 30, 2009 disclosure and knowing that Aurelius had not traded for several weeks prior to it – in its Motion to Compel to make the same omission and point to Aurelius's trading in the aftermath of that disclosure as evidence of wrongdoing. Motion to Compel at 6. Far from rewarding such behavior by granting the Motion to Compel, this Court should consider whether sanctions, including an award of attorneys' fees, should be imposed pursuant to Fed. R. Bankr. P. 7026(g)(3) and/or 9011(c)(1)(B).

17. The Court noted that Mr. Thoma's musings were supported by *no* admissible evidence that would justify paying post-petition interest at the federal judgment rate

rather than the contract rate provided under the Plan, but concluded that it need not reach the issue because the Plan as drafted could not otherwise be confirmed. *In re Washington Mutual, Inc.*, 442 B.R. 314, 359 (Bankr. D. Del. 2011) (the "Opinion").

18. On January 18, 2011, the Equity Committee filed a Motion under Rule 2004 of the Federal Rules of Bankruptcy Procedure ("Rule 2004 Motion") (D.I. 6567), seeking authority to serve broad discovery requests on the Settlement Noteholders concerning allegations of trading based on material nonpublic information. Each of the Settlement Noteholders, including Aurelius, filed an objection to the scope and underlying premise of the Rule 2004 Motion.

19. On February 8, 2011, after a hearing, the Court permitted discovery by the Equity Committee, but agreed with the Settlement Noteholders that the discovery requests were "overly broad." *See* February 8, 2011 Hearing Transcript ("Feb. 8 Tr.") at 81:14 (Trachtman Decl. Ex. B). The Court limited discovery to the following four categories:

(a) Post-petition trading by the Settlement Noteholders (Feb. 8 Tr. 81:24-25, 82:1);

(b) Information received by the Settlement Noteholders during settlement negotiations (Feb. 8 Tr. 82:5-7);

(c) The Settlement Noteholders' valuation of the reorganized Debtors (Feb. 8 Tr. 82:7-9); and

(d) Information regarding ethical trading walls established for post-petition trading (Feb. 8 Tr. 84:17-19).

Significantly, when the parties sought clarification of the scope of "information received," the Court specifically *excluded* the details of settlement offers, stating that "[t]he settlement negotiations themselves are not relevant." Feb. 8 Tr. 83:20-22.

**Aurelius's Compliance With the Ordered Discovery**

20. In compliance with the Court's February 8 ruling (the "February Ruling"), Aurelius reviewed thousands of documents and produced – on a rolling basis, beginning on February 25 and substantially completed by March 21 – all non-privileged documents in the four specific categories ordered by the Court. In aggregate, Aurelius produced 12,350 pages of documents in the four specified categories: trading records showing all trades in the Debtors' securities from the outset of the cases through the filing of the Plan on October 6, 2010; documents showing Aurelius's rigorous internal policies to prevent improper trading; documents reflecting the value Aurelius assigned to the reorganized Debtors' business; and documents reflecting information provided to Aurelius during settlement negotiations (redacted for attorney-client privilege). In the weeks following production, the Equity Committee never questioned or challenged the scope of that production, the redactions, or the privilege assertions. Rather, it made only one additional request – that Aurelius also produce its confidentiality agreements with the Debtors – with which Aurelius complied. Aurelius has thus *fully* complied with the Court's February Ruling.

21. On May 4, the Equity Committee deposed Aurelius Managing Director Dan Gropper for an entire day. The Equity Committee asked virtually nothing about the scope of Aurelius's document production. Far from revealing any improper trading, Mr. Gropper's detailed testimony made clear that these charges had no merit.

22. As the Court is aware, Aurelius is not a member of an official committee and owes fiduciary duties only to its own investors. *See* Opinion, 442 B.R. at 349 ("The Settlement Noteholders were not acting in this case in any fiduciary capacity"); *see also In re Drexel Burnham Lambert Group*, 123 B.R. 702, 706 (Bankr. S.D.N.Y. 1991) (unofficial group members have no fiduciary obligations). Unlike members of official committees, who must

maintain an ethical wall and obtain court approval to trade while participating in a bankruptcy case, Aurelius was presumptively free to trade unless in possession of material nonpublic information received pursuant to a cognizable and continuing legal *duty*. *See United States v. O'Hagan*, 521 U.S. 642, 652 (1997) (trading prohibited only when done "in breach of a duty owed . . . to the source of the information"). Under New York law, which governs the Confidentiality Agreements, "no fiduciary relationship exists where parties were acting and contracting at arms-length to a business transaction." *In re Ames Dept. Stores, Inc.*, 274 B.R. 600, 626 (Bankr. S.D.N.Y. 2002). Thus, Aurelius's duties were limited and defined by the terms of the two confidentiality agreements it entered into with the Debtors (the "Confidentiality Agreements").

23. The Equity Committee distorts both Mr. Gropper's testimony and Aurelius's obligations by implying that Aurelius somehow breached a duty to maintain an ethical wall throughout the entirety of the cases. *See* Motion to Compel at 4, stating that "despite the existence" of its ethical wall procedures, Aurelius failed to maintain a wall "with a single 60-day exception." In fact, as demonstrated above, Aurelius had no such obligation. Moreover, the testimony and documents make crystal clear that, when in possession of material nonpublic information, Aurelius *did* erect an ethical wall or shut down trading in the Debtors' securities. Gropper Dep. 40:4-21, 49:5-50:22, 51:14-52:14. The Equity Committee does not contradict these fundamental facts.

24. More generally, Mr. Gropper's testimony demonstrated that Aurelius is a careful, experienced participant in the bankruptcy and investing process that takes "extremely seriously" its duty to comply with the securities laws. Gropper Dep. 105:14-15. Mr. Gropper himself has served as Chair or Co-chair of the creditors' committees in the Sunbeam,

Stan Lee Media, Mirant, and Vitro bankruptcies; served on the creditors' committees in the WorldCom and Flag Telecom cases; and participated in numerous ad hoc and bank debt steering committees over the last sixteen years. Mr. Gropper is thus intimately familiar with the type of ethical wall trading orders used to screen firm members receiving material nonpublic information from their colleagues engaged in trading. With input from securities law experts at Schulte Roth & Zabel, Mr. Gropper helped adapt these mechanisms to create a policy governing ethical trading wall procedures for Aurelius. In addition to maintaining rigorous written policies barring contact across the wall and requiring all personnel working on a matter to sign individual acknowledgements of the policies, Aurelius invested $150,000 to soundproof Mr. Gropper's office to help maintain the integrity of ethical walls when established. *Id.* at 39:6-15, 44:8-48:14, 105:13-23. And Aurelius enforces its policies: "We have lawyers come in and lecture our investment team about insider trading and the importance of adhering to the securities laws, and therefore if there is a mandatory restriction in a particular name given within the firm, people in the firm comply with it and we obviously make sure they comply with it." Gropper Dep. 105:16-23.

**Aurelius's Limited Involvement in Confidential Settlement Negotiations**

25. As Mr. Gropper explained in detail in his deposition, prior to announcement of the initial settlement in March 2010, Aurelius was invited to participate in confidential settlement negotiations in these cases during two discrete periods, during which time it received limited material nonpublic information. The Debtors ultimately disclosed this information as required by the Confidentiality Agreements. During those narrow periods of active negotiation, Aurelius erected an ethical wall or completely shut down trading. Gropper Dep. 51:14-52:14, 78:18-79:24, 137:5-16, 141:17-142:10, 143:13-145:12, 208:12-210:4.

**The first confidentiality period**

26. The first of these periods occurred between March and May 2009. During this period, Aurelius was not yet part of the Settlement Noteholder group represented by Fried Frank (the group that attracted Mr. Thoma's scrutiny for its role in the settlement, ostensibly justifying this investigation) but a member of an entirely different unofficial creditor group (represented then, as now, by White & Case) that has not been subject to this scrutiny. Aurelius joined the Fried Frank group only in late *October* 2009.

27. Aurelius entered into a Confidentiality Agreement with the Debtors on March 9, 2009, under which the Debtors specifically agreed that, at the expiration of the confidentiality period, the Debtors would disclose "within the meaning of Rule 101 of Regulation FD . . . a fair summary, as reasonably determined by the Debtors, of any Confidential Information that constitutes material nonpublic information under U.S. federal securities law." *See* Trachtman Decl. Ex. C § 13. Upon entering into this agreement and in accordance with its provisions, Aurelius erected an ethical wall between the employee (Mr. Gropper) receiving the material nonpublic information and all Aurelius employees trading in the Debtors' securities. Gropper Dep. 40:4-21, 78:3-79:24. The agreement, and all of Aurelius's obligations under it, terminated on May 8, 2009.

28. During this period, Mr. Gropper testified that Aurelius learned only one piece of material nonpublic information: the estimated range of the Debtors' first tax refund. Gropper Dep. 77:6-19. Indeed the Debtors specifically *declined* to provide other confidential business information that they did not intend ultimately to publish. *Id.* at 81:6-24 ("[T]here were many questions that we had about the assets of the debtors that we asked them during this period which they refused to answer because they said, 'We don't want to have to disclose that so we're not going to tell you.'").

29. The expected tax refund number was published in the Debtors' March 2009 MOR, which was publicly filed on April 30, 2009 and available on the docket and via the free Kurtzman Carson Consultants website. Trachtman Decl. Ex. D at Note 5; Gropper Dep. 76:24-77:13, 167:7-168:21. The Debtors explicitly confirmed in writing to White & Case that this publication satisfied the Debtors' disclosure obligations under their confidentiality agreements. Indeed, White & Case had specifically written to Weil Gotshal to highlight the crucial importance to its clients of being able to rely on the Debtors' determination:

> I wanted to follow up on one point relating to the expiration of the confidentiality agreement so that there is no confusion. I would like to confirm that, pursuant to the confidentiality agreements, the debtors believe that no further disclosure is required. Your confirmation of this point is greatly appreciated. As you can appreciate it, this is an important point to the note holders.

Trachtman Decl. Ex. E (email exchange between White & Case and Weil Gotshal, dated May 7, 2009). The Debtors responded unequivocally: "No problem. The Debtors believe that all required disclosure has been made." *Id.* (email from Weil Gotshal to White & Case, dated May 7, 2009). The Debtors similarly confirmed to Fried Frank (which then represented other creditors subject to the same confidentiality restrictions) that disclosure of the tax refund number satisfied the Debtors' disclosure obligations under their confidentiality agreements**.**

30. By maintaining the ethical wall until the Confidentiality Agreement expired by its own terms on May 8, *after* the Debtors had made the required disclosures, Aurelius satisfied its contractual obligations to the Debtors and was free to resume unrestricted trading. Gropper Dep. 167:7-168:21. Significantly, as the email to White & Case quoted above shows, parties other than Aurelius and the Settlement Noteholders similarly relied upon the

Debtors' safe harbor disclosure obligations when they resumed trading following termination of the restricted period.[7]

31. The only other information that Aurelius is alleged to have received during the first confidentiality period – and the principal basis of the Equity Committee's newly framed charge of improper trading – was the details of certain settlement proposals exchanged between the Debtors and JPM. However, Mr. Gropper testified that these proposals were "galaxies apart" and that negotiations broke down well before the expiration of the confidentiality period. Gropper Dep. 78:18-79:24. More specifically, the Debtors made a written proposal on or about March 12, 2009, with input from creditors, which JPM summarily rejected on March 18: "JP Morgan responded to that proposal by saying, 'You get the deposit and we get everything else'" (*id.* at 79:19-21) – a position that was "billions of dollars apart from the debtor's proposal" (*id.* at 230:9-12). Thereafter, without consulting creditors, the Debtors made another unilateral proposal, and JPM made a further counterproposal that was not shared with Aurelius. *See id.* at 250:7-21.

32. Contrary to the Equity Committee's suggestion, these stale, expired proposals did not constitute an "agreement by both parties" as to the ownership of the disputed deposits or other assets (*see* Motion to Compel at 5) – merely proposals that one party or the other *might* have been willing to pursue at a particular point in time but that did not mature into

[7] The Equity Committee mischaracterizes Mr. Gropper's testimony when it alleges that he acknowledged that he "freely shared . . . everything he learned" during the first confidentiality period with other Aurelius employees. Motion to Compel at 4. Mr. Gropper actually testified that he did not remember specifically what he shared with other Aurelius employees following expiration of the first confidentiality period, but that, in any event, he was free to share what had transpired during that period because the confidentiality agreement had terminated, the Debtors had satisfied their contractual duty to disclose all material nonpublic information, and he was otherwise not in possession of any material nonpublic information. Gropper Dep. 76:20-78:2, 78:18-79:24, 81:7-15, 169:19-170:16, 171:8-19, 208:12-210:4. The point is irrelevant in any event since, once there was no wall in place, Mr. Gropper's knowledge was imputed to Aurelius as a matter of law.

an agreement or the predicate for an agreement. Mr. Gropper testified that "there were many, many moving pieces" in the negotiations and that, even as to certain issues or assets where "you would think you had an agreement," it would turn out later in the negotiations that "it had totally changed." Gropper Dep. 191:14-193:22; *see also id.* at 191:23-24 ("there were many, many, many terms in flux").

33. Indeed, towards the end of the first confidentiality period, on April 27, 2009, the Debtors filed an adversary proceeding against JPM seeking turnover of the disputed deposit accounts (Adv. Case No. 09-50934) – negating any suggestion that the parties had an "agreement" regarding ownership of those assets. On March 24, 2009, in the midst of the restricted period, JPM had itself commenced an adversary proceeding (Adv. Case No. 09-50551) to determine the ownership of many of the assets involved in the settlement negotiations. The commencement of these adversary proceedings only underscored the absence of agreement and how far apart the parties were, allowing the Debtors and other parties to easily conclude on termination of the confidentiality agreement that any previous settlement proposals were not material.

34. Completing its baseless smear, the Equity Committee alleges – again without a shred of justification – that Aurelius engaged in "suspicious" trading following the end of the first confidentiality period in May 2009. The totality of the allegation is that Aurelius "acquired a substantial number of WMI securities during May 2009" – as if that were inherently "suspicious." In fact, trading during that month was informed by the Debtors' disclosure at the end of April that they were likely to receive a tax refund of $2.6 to $3.0 billion – "a very positive material piece of information that was put into the public domain on April 30th 2009." Gropper Dep. 168:19-21. The Equity Committee's account misleadingly omits this crucial fact.

35. Indeed, contrary to the Equity Committee's dishonest implication that Aurelius began trading only when the wall came down (Motion to Compel at 6), Aurelius actually began acquiring significant amounts of the Debtors' securities (after having not traded for about a month) on *May 1, 2009 – the day after publication of the tax information and while the ethical wall was still in place*. If Aurelius had been privy to some special information about a likely deal, one would expect it to accelerate its purchases or amass unusual amounts of the Debtors' securities once the wall came down. But Aurelius's trading records instead reflect the continuation of a completely ordinary pattern of buying and selling. Within the month of May 2009, for example, Aurelius made net face amount purchases of approximately $14.7 million before May 9 and $36 million after – reflecting, respectively, approximately 29 percent and 71 percent of the total for the month. This breakdown corresponds closely with the number of May trading days (six versus fifteen) in the two periods – showing that Aurelius did not accelerate its buying after the wall came down. Moreover, Aurelius's trading records continue to show ordinary transactions throughout the summer of 2009, including the divestiture of a significant amount of PIERS (the security most sensitive to fluctuations in the value of the estates) later in the summer. Indeed, by the end of August 2009, Aurelius actually owned less total face amount of the Debtors' securities than it had when the wall came down on May 9. *See* Motion to Compel, Ex. 4 (summary of Aurelius trades from which all of the foregoing may be calculated). The Equity Committee has these records and knows that its allegations of "suspicious" trading are false.

**The second confidentiality period**

36. Aurelius was not involved in confidential negotiations and received no material nonpublic information from the Debtors for a lengthy period leading up to November 2009. Gropper Dep. 156:10-14. Having joined the Fried Frank group in late October, Aurelius

was then invited to participate in a second period of confidential negotiations. Aurelius entered into a second written Confidentiality Agreement with the Debtors (Trachtman Decl. Ex. F) that was in effect from November 16 through December 30, 2009. During this period, *Aurelius suspended all trading in the Debtors' securities*. Gropper Dep. 104:20-22. This is not disputed. *See* Motion to Compel at 6.

37. Again, the Debtors provided Aurelius with one piece of material nonpublic information: the expected amount of the Debtors' additional tax refund under the recently passed legislation extending the NOL lookback period. *Id.* at 138:11-139:6, 259:23-260:16. The fact that the legislation had passed in November was obviously already public, and informed Aurelius's trading in the Debtors' securities *prior* to the confidentiality period, but the amount of the expected tax refund was independently material and turned out to be significantly higher than anticipated. *Id.* at 138:21-139:6, 153:20-155:4.

38. As before, the Debtors undertook the contractual obligation to publish any material nonpublic information shared during the course of the confidentiality period in order to provide a safe harbor for those parties who agreed to become restricted. Trachtman Decl. Ex. F § 13. And once again, the Debtors complied with their obligation by publishing the tax refund estimate in the November MOR, publicly filed on December 30, 2009. Trachtman Decl. Ex. A at Note 5. Moreover, the Debtors confirmed, in an email to Aurelius's counsel sent at Mr. Gropper's request, that upon filing of this MOR, the Debtors considered "all necessary disclosure obligations to have been satisfied and the Confidentiality Agreement may be deemed terminated" (Trachtman Decl. Exh. G; Gropper Dep. 141:17-142:10) – thereby terminating any further obligations on Aurelius's part. In these circumstances, it cannot seriously be suggested that Aurelius acted inequitably in resuming trading.

39. As with the earlier confidentiality period, negotiations in November and December 2009 "never went anywhere." Gropper Dep. 137:14. After the Debtors made an initial proposal to split the old and new tax refunds, JPM responded in November 2009 with a counterproposal under which JPM would retain 100 percent of the old refund and the Debtors would take 100 percent of the new refund created by the legislation (*id.* at 186:13-17) – thereby placing on the Debtors all of the risk of the less certain new refund. Mr. Gropper believed that proposal was "ludicrous" (*id.* at 186:11-20), and as a result "[t]he parties were very far apart and they definitively terminated in the middle of December" (*id.* at 137:14-16). While the creditors formulated another proposal in December, Mr. Gropper was not even sure that the Debtors had yet transmitted it when the key JPM official went on vacation and shut down negotiations. *Id.* at 188:3-12. "He went away in the middle of December, so when we left the confidentiality period, effectively the parties were miles apart in terms of any negotiations." *Id.* at 265:10-14.

40. Not surprisingly, both the Debtors and Aurelius readily concluded that this stale, inconclusive, and unsuccessful negotiating process left no material nonpublic information to disclose. *Id.* at 143:21-144:13. In this connection, the Debtors relied on their experienced securities law and restructuring counsel at Weil Gotshal; Aurelius ensured that it was acting properly by consulting its own experienced securities law counsel at Fried Frank and Schulte Roth. Gropper Dep. 78:5-12, 147:6-14. There was no dissension on the point that the settlement negotiations during the second restricted period were not material and did not need to be disclosed.

41. Once again, the Equity Committee irresponsibly suggests that Aurelius's trading following the end of the second confidentiality period was "suspicious." Motion to Compel at 6. But as just noted, Aurelius's December 31, 2009 purchases of PIERS

followed publication of the news that the Debtors expected an *additional* $2.6 billion in tax refunds – "[m]assively, massively positive input" and "one of the most material disclosures that had been made in the entire bankruptcy case." Gropper Dep. 135:9-136:17. These purchases were anything but suspicious, and the Equity Committee's suggestion that JPM's rejected settlement proposal from several weeks earlier – which might or might not represent JPM's position in future negotiations – constituted material, nonpublic information is contrary to the contemporaneous good faith judgment of all parties and has zero support in securities law or common sense.

42. After December 2009, Mr. Gropper testified, Aurelius had no further involvement in the settlement negotiations between the Debtors and JPM; it learned the terms of the initial agreement with JPM only when it was announced in open court on March 12, 2010. Gropper Dep. 266:3-10. Significantly, the deal announced in March differed dramatically from the proposals being discussed back in December, when Aurelius was last privy to confidential negotiations. Among other things, the March settlement was a three-way understanding that folded in the FDIC in addition to the Debtors and JPM, resolving billions of dollars in claims that the FDIC had against the estates. *See* Trachtman Decl. Ex. H (excerpts of transcript of March 12, 2010 hearing at 20, 22-23). Moreover, even the tentative deal announced in March proved to be illusory – it fell apart when the FDIC backed out, and it was eventually renegotiated with yet another set of terms, which after extensive new negotiations were ultimately embodied in the May 2010 iterations of the Plan and GSA. Gropper Dep. at 128:9-18. The fact that it took more than a full year after the March 2009 negotiations to announce even a *tentative* deal and months more for the deal to come to rest is affirmative evidence that what happened in the earlier negotiations did not constitute an "agreement" requiring disclosure.

43. Contrary to the Equity Committee's distorted account, Aurelius did not give outside counsel "authority to approve the Global Settlement Agreement on Aurelius's behalf" (Motion to Compel at 7), but rather Mr. Gropper sought unsuccessfully to become involved in the early March negotiations through another confidentiality agreement. After the tentative terms of the settlement were announced in court on March 12, Aurelius became restricted for several days in order to review and approve the actual documentation of the GSA and Plan. Gropper Dep. 268:19-270:4, 271:8-15.[8]

44. Despite the utter absence of a legal or factual basis, the Equity Committee states that there are grounds to conclude Aurelius engaged in improper trading. Motion to Compel at 2, 6. This is nothing more than an unfounded and defamatory smear. The Equity Committee now tries to bootstrap onto this canard a renewal of many of its original overly broad demands for document production – including *all internal and external* communications in these huge, complex cases spanning over two and a half years. These demands and the Motion to Compel fly directly in the face of this Court's February Ruling narrowing discovery and, indeed, are actually broader than the original discovery demands previously rejected by this Court – including, for example, all communications between Aurelius's *counsel* and the Debtors even if Aurelius never received them. All of the requests constitute harassment and overreaching and should not be entertained.

[8] The Equity Committee's statement that Mr. Gropper claimed *never* to have received material nonpublic information except during the two formal confidentiality periods (Motion to Compel at 7) is thus false. Mr. Gropper in fact testified that at other points during the documentation of subsequent versions of the Plan and GSA Aurelius agreed to become restricted in order to review draft documents. Gropper Dep. 53:22-54:3, 129:15-131:15. This was apparent in any event from the face of Aurelius's document production, and the Equity Committee's failure to focus on these phases of the case at Mr. Gropper's deposition or in the Motion to Compel suggests the absence of any issue about Aurelius's conduct in this regard.

## OBJECTION TO THE MOTION TO COMPEL

45. The Motion to Compel should be denied because of the total lack of any good faith basis for questioning Aurelius's behavior in these cases. There is simply no reason to impose *any* additional burden on an innocent party. The Motion to Compel should also be denied as untimely and as an unjustified *sub rosa* attempt to reargue the Court's February Ruling.

### 1. The Equity Committee Has Failed to Demonstrate Any Wrongdoing By Aurelius or Any Need for Further Discovery

46. The *undisputed* facts show that Aurelius *did nothing wrong* – and on that ground alone, this Court should deny the Motion to Compel in its entirety. Rule 2004 discovery is intended as "a pre-litigation device to determine whether there are grounds to bring an action." *In re The Bennett Funding Group, Inc.* 203 B.R. 24, 28 (Bankr. N.D.N.Y. 1996). "[W]hile Rule 2004 allows a fishing expedition to some extent, it may not be used as a device to launch into a wholesale investigation of a non-debtor's private business affairs." *In re Countrywide Home Loans*, 384 B.R. 373, 393-94 (Bankr. W.D. Pa. 2008). And of course, discovery undertaken for inappropriate purposes should not be permitted. *See In re Wash. Mut., Inc.*, 408 B.R. 45, 50 (Bankr. D. Del. 2009) (Walrath, J.) ("There are . . . limits to the use of Rule 2004 examinations. It may not be used for purposes of abuse or harassment and it cannot stray into matters which are not relevant to the basic inquiry." (internal citations and quotations omitted)).

47. Here, the investigation has been much more than "preliminary" and has yielded not a scintilla of evidence that Aurelius did anything but honor its legal and contractual commitments and contribute constructively (to the extent it was asked to participate) in settlement and plan negotiations. It is undisputed that Aurelius maintained an ethical wall during the first contractual confidentiality period; did not trade during the second period; and

resumed trading only after the agreements terminated and the Debtors had satisfied their obligations to disclose material nonpublic information. No additional facts are needed to conclude that *three independent grounds* bar any assertion that Aurelius engaged in wrongdoing.

48. *First*, as noted above (at ¶ 22), trading by a non-fiduciary does not violate the securities laws unless done *in breach of a duty to the source of the information*. *See Dirks v. S.E.C.*, 463 U.S. 646, 657 (1983) ("[O]nly *some* persons, under *some* circumstances, will be barred from trading while in possession of material nonpublic information." (citing *Chiarella v. United States*, 445 U.S. 222, 232 (1980) (no duty not to trade where party is neither the corporation's "agent" nor its "fiduciary") (emphasis added)). The need for a breach of duty flows from the requirement of deception or manipulation as an element of securities fraud. The party misappropriating inside information must be guilty of "deception of those who entrusted him with access to confidential information." *United States v. O'Hagan*, 521 U.S. 642, 652 (1997). Where the recipient of information *discloses* to the source that he plans to trade on it, "there is no 'deceptive device' and thus no section 10(b) violation." *Id.* at 655.

49. Here, Aurelius indisputably *satisfied* all of its duties to the Debtors, and any obligations it had under the Confidentiality Agreements *terminated* with those agreements. There is no allegation that Aurelius in any way deceived the Debtors or misappropriated any information; to the contrary, all parties understood and expected that the Settlement Noteholders would resume unrestricted trading upon termination of the confidentiality periods. Having breached no duty, Aurelius cannot be liable for improper trading.

50. *Second*, it follows that, as a matter of bankruptcy law, Aurelius cannot be found on these facts to have acted "inequitably." It is not disputed that Aurelius scrupulously

honored its contractual obligations to the Debtors during the confidentiality periods and resumed trading only after the Debtors' themselves, based on consultation with expert securities law and restructuring counsel, cleared the way. Aurelius rigorously followed confidentiality procedures recognized and accepted in bankruptcy cases for decades in order to participate, at the Debtors' request, in discussions aimed at moving these cases towards a consensual resolution. No party has ever suggested that Aurelius did *anything* to harm, disrupt, or impede these cases in any way. Finding that a party acted "inequitably" by cooperating with and relying on the Debtors' own procedures governing settlement negotiations would turn long-established bankruptcy practice and law on its head and chill future efforts to negotiate resolutions of complex cases.

51. And *third*, while the Court need not reach this issue because Aurelius's compliance with its own obligations is sufficient, the undisputed evidence clearly shows that *the Debtors were correct* in concluding that the information provided to Aurelius in settlement negotiations either was disclosed (e.g., tax information) or was not material (e.g., details of unsuccessful settlement proposals). Under the securities laws, information about preliminary, inconclusive, or stale negotiations is immaterial as a matter of law. *See*, *e.g.*, *Taylor v. First Union Corp. of S.C.*, 857 F.2d 240, 244-45 (4th Cir. 1988) ("preliminary, contingent, and speculative" negotiations immaterial because there was "no agreement as to the price or structure of the deal"; requiring disclosure in such situations "would result in endless and bewildering guesses as to the need for disclosure, operate as a deterrent to the legitimate conduct of corporate operations, and threaten to 'bury the shareholders in an avalanche of trivial information'" (citation omitted)); *In re Kidder Peabody Sec. Litig.*, 10 F. Supp. 2d 398, 412 (S.D.N.Y. 1998) ("[S]tale information is immaterial as a matter of law.").

52. Here, it is undisputed that both confidentiality periods ended with the parties dramatically apart, settlement discussions terminated, and the parties relying on pending litigation to sort out their entitlements to various assets. It is sheer speculation for the Equity Committee to suggest (Motion to Compel at 5) that knowledge of JPM's position on one or another potential settlement term in March or November 2009 could provide *any* assurance that JPM would continue to offer that resolution in the context of another negotiation at another time and place in this complex multi-party and multi-issue negotiation.

53. In any event, what is dispositive for purposes of the present Motion to Compel is that no further discovery is needed on these issues. Even before (and certainly after) Mr. Gropper's deposition, the Equity Committee had all the information it needed to make its baseless argument about the materiality of the rejected settlement offers. It is not disputed that Aurelius received certain settlement information, that the information was not publicly disclosed, and that Aurelius traded once the Confidentiality Agreements terminated. Whether this conduct violated Aurelius's contractual obligations to the Debtors or whether the settlement proposals could be viewed as material nonpublic information as of the termination of each period are largely questions of law as to which the additional burdensome discovery sought would add little or nothing of any relevance. The Equity Committee is free to present its baseless theory at confirmation. But it does not need new discovery to do so.

54. Indeed, the absence of any need for the new discovery only highlights that its main purpose is to create burden and delay. Aurelius has already been subjected to millions of dollars in harm from delay and unnecessary legal fees responding to the Equity Committee's baseless charges. The wholesale investigation now sought into every communication Aurelius had, internally or externally, during complex two and a half year bankruptcy cases would require

review of tens of thousands of additional documents representing hundreds of thousands of pages – delaying these cases for many, many months while inflicting millions more in costs and expenses and distracting Aurelius's senior personnel from conducting their business.

55. Moreover, if further discovery is allowed – now that the Equity Committee's theory is clear – it will be necessary to take discovery of a wide range of parties that may well have engaged in unrestricted trading after participating in or learning the details of unsuccessful negotiations, to demonstrate that Aurelius's conduct was consistent not only with well-recognized industry practice but also with the conduct of many other similarly situated parties *in these cases*. These parties could include (i) the Trust Preferred Holders, (ii) certain other holders of WMI debt securities who have identified themselves as the "WMI Noteholders," (iii) certain holders of the LTWs, and (iv) certain holders of notes issued by WMI's subsidiary, Washington Mutual Bank, who have identified themselves as the "Bank Bondholders." For example, certain LTW holders may have disposed of substantially their entire positions, and other LTW holders acknowledged in writing that they disposed of a large portion of their holdings, at the same time that they were participating in the recent failed mediation. In addition, prior to the announcement of the recent failed settlement with the Equity Committee, tens of millions of shares of the Debtors' common stock changed hands, causing the price to spike sharply. Investigating each such situation could add many months to these cases, to the detriment of the Debtors and their estates. The Court should avoid this unfortunate detour by denying the Motion to Compel. Moreover, as explained below, the timing and specifics of the new document requests provide additional grounds for denying the Motion.

**2. The Motion to Compel Should Be Denied As Untimely and Tactically Motivated**

56. To the extent the Motion to Compel is predicated on supposed inadequacies in Aurelius's production, it should be denied as untimely and obviously tactical. This Court has the power to act "to prevent delay and harassment" when considering a motion to compel additional discovery. *Lapenna v. Upjohn Co.*, 110 F.R.D. 15, 18 (E.D. Pa. 1986) (denying motion to compel). A party seeking to compel additional discovery must do so "within a reasonable time" after discovering a deficiency. *Carnathan v. Ohio Nat'l Life Ins. Co.*, No. 1:06-CV-999, 2008 U.S. Dist. LEXIS 65546, *5 n.2 (M.D. Pa. Aug. 28, 2008), *vacated on other grounds*, 2008 U.S. Dist. LEXIS 65547 (M.D. Pa. Aug. 28, 2008).

57. Where, as here, a party demands additional discovery on the eve of trial after a period of inaction – magnified and exacerbated here by the expedited nature of this confirmation-related discovery process – the court may interpret such inaction as a waiver of that party's right to avail itself of Rule 37. *See Andrews v. Home Depot, Inc.*, No. 03-CV-5200, 2008 U.S. Dist. LEXIS 61708, *5 (D.N.J. Aug. 12, 2008). The Court's discretion as to what constitutes unreasonable delay in filing a motion to compel is not limited by rule or statute, and courts routinely deny such motions on grounds of efficiency. *See Range v. Brubaker*, No. 3:07-CV-480, 2008 U.S. Dist. LEXIS 102194, *10-11 (N.D. Ind. Dec. 16, 2008) (denying motion to compel because, *inter alia*, motion was filed four months after allegedly defective interrogatory answers were provided).

58. Here, the Equity Committee's allegation that Aurelius "failed to produce several important categories of documents" covered by the February Ruling (Motion to Compel at 2) is simply false. To the contrary, as demonstrated below, it is the Equity Committee that seeks to reverse the limitations built into the February Ruling and even to expand upon its

original Rule 2004 requests. But the Court need not get bogged down in these details. It is simply too late in the day for the Equity Committee to surface with complaints about the scope of Aurelius's production, particularly in a fashion that appears calculated principally to threaten to delay confirmation and thereby coerce a settlement. Aurelius produced the bulk of its documents in *March*. The Equity Committee did not ask a single question at that time about the scope of Aurelius's searches or challenge *in any way* the quality or quantity of its production, the scope of its privilege assertions, or the redaction of documents produced. Among other things, it was readily apparent on the face of Aurelius's production that it had received information through counsel and that Aurelius had redacted communications from its counsel contained in transmittal emails.[9] The Equity Committee barely touched on the scope of Aurelius's production even during Mr. Gropper's deposition.[10]

59. Even when the Equity Committee belatedly surfaced with its new discovery demands following the May 4 deposition, it chose not to proceed with the Motion to Compel until mid-June, only a few weeks before confirmation. Although the Equity Committee says it agreed with counsel for other parties not to file the motion pending settlement discussions (Motion to Compel at 12), *Aurelius* was not a party to any such agreement and indeed was pointedly *excluded* from the negotiation process. There is thus no excuse for the Equity

[9] Moreover, outside counsel's descriptions of the transmitted documents and other communications about events in the case were properly redacted and withheld as privileged, while the underlying communications and documents passed along from the Debtors were produced in original, unredacted form. This distinction was appropriate. *See Teleglobe USA, Inc. v. BCE Inc. (In re Teleglobe Communs. Corp.)*, 392 B.R. 561, 586 (Bankr. D. Del. 2008) (Walrath, J.) ("[W]aiver of privileged information cannot be justified merely to provide the opposing party information helpful to its cross-examination or because information is relevant." (internal citation and quotations omitted)).

[10] Seeking to create the impression of an incomplete production, the Equity Committee states that other parties have produced copies of "communications" shared with Mr. Gropper or others from Aurelius that Aurelius did not produce. Motion to Compel at 10-11. However, the Equity Committee neither specifies the documents to which it is referring nor establishes that any such documents were within the scope of discovery ordered by this Court.

Committee's failure to timely pursue its remedies, particularly with the clock ticking on confirmation of the Modified Sixth Amended Plan. The Court should reject the Equity Committee's eleventh hour bid to create burden, expense, and delay aimed at extracting a pay-off.

### 3. The Motion to Compel is an Improper *Sub Rosa* Attempt to Reargue the February Ruling

60. The Motion to Compel should also be denied as a *sub rosa* attempt to re-argue the February Ruling limiting discovery. In that ruling, the Court appropriately focused the Equity Committee's inquiry on the closest thing here to a legitimate question: what confidential information did the Debtors provide to Aurelius during settlement negotiations, in circumstances creating a legal duty to maintain confidentiality and/or refrain from trading. That information has been produced, and, as demonstrated above, it makes clear that Aurelius satisfied its duties to the Debtors under both the securities laws and bankruptcy law.

61. There is thus even less justification now than there was back in February for the broader discovery rejected by the Court then and sought again now by the Equity Committee. This already-rejected discovery includes requests for:

- All *internal* Aurelius communications, including its proprietary and confidential WMI investment "model";[11]

[11] The Equity Committee's suggestion that Aurelius's internal documents could prove materiality (Motion to Compel at 9-10) ignores that this question is determined according to an objective test: "[T]he law defines 'material' information as information that would be important to a reasonable investor in making his or her investment decision." *In re Burlington Coat Factory*, 114 F.3d 1410, 1425 (3d Cir. 1997). Determining whether Aurelius plugged settlement terms into its model would prove nothing in any event. Mr. Gropper explained that the model was a constantly changing document that included hundreds of different inputs (Gropper Dep. 181:5-6) – obviously not all of them "material." The inclusion of one data point among hundreds did not indicate any particular level of importance. Indeed, Aurelius might have modeled a settlement proposal simply to better understand its impact, without believing it was likely to come to fruition. None of this would indicate whether Aurelius made a decision to trade on the basis of such information. Moreover, the Model includes inputs based on business judgments, proprietary knowledge, and advice of counsel – all of which make it inappropriate to produce absent compelling justification.

- Documents reflecting routine, non-confidential contacts between Aurelius and the Debtors and their professionals having nothing to do with confidential settlement negotiations;[12] and
- "Compliance" documents, to confirm further something not disputed on this record – that Aurelius complied with the ethical wall procedures and trading restrictions in place during the two confidential periods.[13]

The Court correctly limited discovery at the outset, and the record amassed only confirms the absence of any justification for a broader inquiry.[14]

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Nor does it matter what specific information learned during the first confidentiality period Mr. Gropper shared with his colleagues once the ethical wall came down in May 2009. *See* Motion to Compel at 10. Once there was no ethical wall in place, Aurelius was charged with any knowledge that Mr. Gropper had, regardless of what he told to whom. The only relevant question in this regard is *what information the Debtors gave to Aurelius in the negotiations*. Contrary to the Equity Committee's suggestion (Motion to Compel at 9), that is all the Court ordered produced, and Aurelius has complied.

[12] Mr. Gropper testified that such contacts are common but carefully structured to *avoid* imparting material nonpublic information. It is Aurelius's practice to preface communications with a debtor or its representatives with a clear statement that "we are trading in the securities of the debtor, we do not want you to tell us material nonpublic information" and to have such contacts only with senior professionals who understand how to comply with this requirement. Gropper Dep. 50:2-11, 55:18-56:2. Inquiring into such communications would be a burdensome and open-ended fishing expedition not calculated to yield anything relevant to the current inquiry. Again, contrary to the Equity Committee's argument (Motion to Compel at 10), the Court did *not* order production of all communications with the Debtors – only of information provided by the Debtors in settlement negotiations.

[13] Mr. Gropper testified at length about the rigorous procedures Aurelius follows to ensure compliance with the laws and regulations governing securities trading, including maintaining written policies, signed acknowledgments, and the major expense of soundproofing his office. Gropper Dep. 44:8-57:16. He further testified that he and other Aurelius employees monitor trading *daily* to assure that there are no trades in restricted names. *Id*. at 105:24-107:4. Indeed, the Equity Committee has not alleged that Aurelius did not rigorously observe the ethical wall in place during the first confidentiality period, and it affirmatively *admits* that Aurelius *did not trade* during the second confidentiality period. Motion to Compel at 6. In this factual setting, the Equity Committee's request for some kind of further internal confirmation of compliance procedures is utterly pointless.

14 Contrary to the Equity Committee's assertion that more discovery is needed because Mr. Gropper "was also unable to recall details about information he may or may not have obtained from the Debtors" about litigation claims held by the estates (Motion to Compel at 9), Mr. Gropper testified only that he could not recall what response he got from the Debtors' lawyers to *his ideas* about how to best pursue the litigation against JPM. *See* Gropper Dep. at 256:23-257:24.

62. Moreover, the Court's earlier recognition that "the settlement negotiations themselves are not relevant" (Trachtman Decl. Ex. B, Feb. 8 Tr. 83:20-21) should foreclose the entire theory the Equity Committee has now concocted to argue that knowledge of inconclusive, unsuccessful negotiations constitutes material nonpublic information. It does not – as this Court recognized and securities law confirms. *See id.* at 83:21-22; *see also* above at ¶ 51. The Equity Committee has known since March that the *business* information provided was disclosed and only stale settlement proposals remained "nonpublic." If it wished the Court to reconsider its ruling that settlement negotiations were "irrelevant" – particularly as a basis for newly expanded discovery – it should have raised the issue months ago.

63. One newly sought category of documents – communications between Aurelius's outside counsel and the Debtors (Motion to Compel at 11) – is particularly baffling, because unless shared with Aurelius, those communications are irrelevant to whether *Aurelius* received material nonpublic information. As is common practice for unofficial creditor groups in virtually every large bankruptcy case, Aurelius frequently relied on outside counsel to act for it as an information screen – so that its views could be expressed in negotiations and counsel could remain informed without necessarily requiring Aurelius to become restricted. Gropper Dep. 129:23-131:15, 267:22-268:6. For example, Mr. Gropper described the "strict instructions" Aurelius gave to Fried Frank "not to communicate to us any material nonpublic information." *Id.* at 129:23-130:2. We have found no legal authority that challenges or criticizes the use of counsel in that manner. To the contrary, the use of an attorney as a screen accords directly with S.E.C. Rule 10b5-1(c)(2), which provides that an entity may demonstrate that a purchase or sale of securities was not made "on the basis of material nonpublic information" if the entity demonstrates that: (i) the individual making the investment decision was not aware of the

information, and (ii) the entity "had implemented reasonable policies and procedures . . . to ensure that individuals making investment decisions would not violate the laws prohibiting trading on the basis of material nonpublic information." 17 C.F.R. § 240.10b5-1(c)(2) (2011). The suggestion that Aurelius is somehow charged with knowledge of information received only by outside counsel is supported by no legal authority and would turn normal practice in every major case on its head.

* * *

64. In short, there is no good reason for the Equity Committee to be demanding this renewed and expanded discovery. It is driven purely by litigation tactics, as a tool to put burden, expense, and pressure on the Settlement Noteholders and thereby coerce an undeserved settlement. This is particularly inappropriate conduct in view of the gravity of the unsubstantiated charges the Equity Committee tosses around so recklessly and the severe reputational damage that could be inflicted on wholly innocent parties – including respected entities and individuals with unblemished decades-long reputations in the industry – that stand in the way of its payday. These burdens are being placed unfairly on parties that not only did nothing wrong but also spent countless hours attempting to improve estate recoveries (agreeing, among other things, to lock-up provisions and trading restrictions that imposed real costs on themselves). The process used to facilitate participation in these settlement negotiations while avoiding inappropriate trading could serve as a model for complex cases. If it is not found to have protected creditors in these cases, the implications for future negotiations are grave.

65. This Court granted more discovery than Aurelius thought was appropriate, apparently to grant the Equity Committee some leeway to explore whether anything real lay behind Mr. Thoma's speculation. Discovery to date has proven that, as Gertrude Stein

said of Oakland, "there is no there there." The Equity Committee has the basic facts to present at confirmation its novel theory about the materiality of unsuccessful settlement offers, a theory that seeks to rewrite federal securities law and upend the procedures observed in virtually every large bankruptcy case. It does not need any more discovery to do so. It seeks discovery not to answer any legitimate factual question but only to harass and extort.

## CONCLUSION

For the reasons stated above, Aurelius respectfully requests that the Motion to Compel be denied and that the Court order such other and further relief as is just.

Dated: Wilmington, Delaware
June 28, 2011

**BLANK ROME LLP**

*/s/ Victoria Guilfoyle*

Michael D. DeBaecke (No. 3186)
Victoria Guilfoyle (No. 5183)
1201 Market Street, Suite 800
Wilmington, Delaware 19801
Telephone: (302) 425-6400
Facsimile: (302) 425-6464
E-mail: Debaecke@BlankRome.com
Guilfoyle@BlankRome.com

-and-

Kenneth H. Eckstein
Thomas Moers Mayer
Jeffrey S. Trachtman
Philip Bentley
KRAMER LEVIN NAFTALIS & FRANKEL LLP
1177 Avenue of Americas
New York, New York 10036
Telephone: (212) 715-9100
Facsimile: (212) 715-8000
E-mail: keckstein@kramerlevin.com
tmayer@kramerlevin.com
jtrachtman@kramerlevin.com
pbentley@kramerlevin.com

*Attorneys for Aurelius Capital Management, LP*

**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE DISTRICT OF DELAWARE**

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|---|---|
| In re:<br><br>WASHINGTON MUTUAL, INC., *et al*.,[1]<br><br>Debtors. | Chapter 11<br><br>Case No. 08-12229 (MFW)<br>Jointly Administered<br><br>**Re: Dkt. No. 7906** |

**DECLARATION OF JEFFREY S. TRACHTMAN**

I, Jeffrey S. Trachtman, hereby declare:

1. I am a partner with the law firm of Kramer Levin Naftalis & Frankel LLP, attorneys of record for Aurelius Capital Management, LP ("Aurelius"), in these chapter 11 proceedings.

2. I submit this Declaration in support of Aurelius's Objection to the Motion of the Official Committee of Equity Security Holders for an Order Compelling Production of Documents (the "Objection"). Capitalized terms not defined herein have the meanings set forth in the Objection, which is being filed contemporaneously herewith.

3. Attached hereto as Exhibit A is an excerpt of a true and correct copy of the Debtors' November 2009 Monthly Operating Report, filed publicly on December 30, 2009 (D.I. 2077).

4. Attached hereto as Exhibit B is a collection of excerpts from a true and correct copy of the transcript of the hearing held before this Court on February 8, 2011.

5. Attached hereto as Exhibit C is a true and correct copy of a confidentiality agreement entered into between Aurelius and the Debtors, dated March 9, 2009.

[1] The Debtors are (i) Washington Mutual, Inc. and (ii) Washington Mutual Investment Corp.

6. Attached hereto as Exhibit D is an excerpt of a true and correct copy of the Debtors' March 2009 Monthly Operating Report, filed publicly on April 30, 2009 (D.I. 970).

7. Attached hereto as Exhibit E is a true and correct copy of an email string containing an email exchange between Brian Rosen of Weil, Gotshal & Manges LLP and Gerard Uzzi of White & Case LLP, dated May 7, 2009.

8. Attached hereto as Exhibit F is a true and correct copy of a confidentiality agreement entered into between Aurelius and the Debtors, dated November 16, 2009.

9. Attached hereto as Exhibit G is a true and correct copy of an email string containing an email from Brian Rosen of Weil, Gotshal & Manges LLP to Matthew Roose of Fried, Frank, Harris, Shriver & Jacobson LLP, copying others, dated December 28, 2010.

10. Attached hereto as Exhibit H is a collection of excerpts from a true and correct copy of the transcript of the hearing held before this Court on March 12, 2010.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 28, 2011

*/s/ Jeffrey S. Trachtman*

Jeffrey S. Trachtman
Kramer Levin Naftalis & Frankel LLP
1177 Avenue of the Americas
New York, NY 10036
(212) 715-9100
jtrachtman@kramerlevin.com

# EXHIBIT A

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

**In re Washington Mutual, Inc., et al.**

**Case No. 08-12229 (MFW)**
**Reporting Period: 11-01-09 to 11-30-09**

## MONTHLY OPERATING REPORT

| REQUIRED DOCUMENTS | Form No. | Document Attached | Explanation Attached |
|---|---|---|---|
| Schedule of Cash Receipts and Disbursements | MOR-1 | Yes | |
| Bank Reconciliation (or copies of Debtors' bank reconciliations) | MOR-1a | Refer to attached stmt | |
| Schedule of Professional Fees Paid | MOR-1b | Yes | |
| Copies of bank statements | MOR-1c | Refer to attached stmt | |
| Cash disbursements journals | | n/a | Refer to MOR 1 for summary of all disbursements. |
| Statement of Operations | MOR-2 | Yes | See attached notes |
| Balance Sheet | MOR-3 | Yes | See attached notes |
| Status of Post petition Taxes | MOR-4 | Yes | |
| Copies of IRS Form 6123 or payment receipt | | n/a | Payroll services outsourced including remission of taxes |
| Copies of tax returns filed during reporting period | | n/a | See listing of filings |
| Summary of Unpaid Post petition Debts | MOR-4 | n/a | Detail on face of balance sheet. |
| Listing of aged accounts payable | MOR-4 | Yes | |
| Accounts Receivable Reconciliation and Aging | MOR-5 | n/a | No trade receivables |
| Debtor Questionnaire | MOR-5 | Yes | |

I declare under penalty of perjury (28 U.S.C. Section 1746) that this report and the documents attached are true and correct to the best of my knowledge and belief.

Signature of Authorized Individual*

December 30, 2009
Date

John Maciel
Printed Name of Authorized Individual

Chief Financial Officer
Title of Authorized Individual

*Authorized individual must be an officer, director or shareholder if debtor is a corporation; a partner if debtor is a partnership; a manager or member if debtor is a limited liability company.

## Note 2: Restricted Cash and Cash Equivalents

WMI's restricted cash and cash equivalents of $95 million includes $39 million of accumulated dividends related to amounts held in escrow pertaining to that certain action styled as *American Savings Bank, F.A et al. v United States*, Case No 92-872C pending in the United States Court of Federal Claims, $53 million in a deposit account pledged as collateral to secure prepetition intercompany transactions between WMI and WMB and $3 million held as part of a Rabbi Trust.

## Note 3: Investment in Subsidiaries

WMI's investment in subsidiaries represents the book value of WMI's subsidiaries, including WMI Investment Corp. ("WMI Investment"). This balance does not represent the market value of these entities.

WMI subsidiaries hold unsecured notes receivable from WMB or JPMorgan, as the case may be, totaling approximately $179 million.

## Note 4: Funded Pension

The funded pension balance reflects the (1) the market value of assets as of December 2, 2008 less (2) the November 2008 actuarial estimated settlement value of September 25, 2008 liabilities. The value does not reflect any recent changes in market values, interest rate assumptions and the participants since November 2008 which could materially affect the results.

## Note 5: Taxes

The tax asset and liability balances are recorded consistent with WMI's historical accounting practices as of the Petition Date and adjusted for refunds collected. Generally, tax related claims and payables are recorded on WMI's books and records on a consolidated basis with the other members of the consolidated tax group and have not been adjusted for any potential claims against these assets. The current recorded balances do not reflect all expected refunds or payments as these amounts are currently being reviewed. The current estimate for the total expected refunds, net of potential payments, is in the range of approximately $2.6 - $3.0 billion. JPMorgan, the purchaser of substantially all of WMB's assets, has asserted significant claims to the expected tax refunds.

On November 6, 2009, the Worker, Homeownership, and Business Assistance Act of 2009 (the "Act") became enacted into law. The Act provides, in pertinent part, that corporate taxpayers, subject to certain limitations, may elect to extend the permitted Net Operating Loss carryback period from two years to five years (with such taxpayers only receiving half this benefit in the fifth year). WMI estimates such an election could result in additional refunds of up to approximately $2.6 billion, as to which there are competing claims of ownership.

No provision or benefit from income taxes has been recorded as the NOL's are expected to be sufficient to offset income during the reported period. Income tax expense contains minimum taxes paid in certain states.

## Note 6: Liabilities Subject to Compromise (Pre-Petition) – Payroll and benefit accruals

WMI's pre-petition payroll and benefit accruals include balances reflecting WMI's historic accounting policies related to pension accounting. Prior to the Petition Date, WMI recorded a $274 million liability in respect of such accruals and WMB recorded a $274 million asset, which amounts were netted out and eliminated on a consolidated basis. Neither balance was reported as an intercompany balance. WMI is analyzing these accounting entries and treatment within the context of its bankruptcy proceedings.

# EXHIBIT B

UNITED STATES BANKRUPTCY COURT

DISTRICT OF DELAWARE

| | | |
|---|---|---|
| In the Matters of: | * | |
| WASHINGTON MUTUAL, INC., et al., | * | Case No. 08-12229(MFW) |
| Debtors. | * | |
| BROADBILL INVESTMENT CORP., | * | |
| Plaintiff, | * | |
| v. | * | Adv. Pro. No. 10-50911(MFW) |
| WASHINGTON MUTUAL, INC., | * | |
| Defendant. | * | |
| MICHAEL WILLINGHAM and ESOPUS CREEK VALUE LP, | * | |
| Plaintiffs, | * | |
| v. | * | Adv. Pro. No. 10-51297(MFW) |
| WASHINGTON MUTUAL, INC., | * | |
| Defendant. | * | |

- - - - - - - - - - - - - - - - - - -*

WASHINGTON MUTUAL, INC. and *

WMI INVESTMENT CORP. *

Plaintiffs, *

v. * Adv. Pro. No. 10-53420(MFW)

PETER J. AND CANDANCE R. ZAK *

LIVING TRUST OF 2001 U/D/O *

AUGUST 31, 2001, et al., *

Defendants. *

- - - - - - - - - - - - - - - - - - -*

United States Bankruptcy Court

824 North Market Street

Wilmington, Delaware

February 8, 2011

10:31 AM

B E F O R E:

HON. MARY F. WALRATH

U.S. BANKRUPTCY JUDGE

ECR OPERATOR: BRANDON MCCARTHY

that threshold created these securities issues, the debtors would abandon the rights offering. And so, Your Honor, in the plan that was filed today, the rights offering is not included. So it is not because that there were, in our mind, Your Honor, we were trying to focus or generate interest in the rights offering to a certain level of PIERS holdings. Rather, it was compliance with securities laws that we did it. And as a result of that, Your Honor, we have now, in the modified plan, taken that out.

Your Honor, whatever way you go today, Your Honor, we only ask that we stick to May 2nd. Thank you.

THE COURT: Well, I am going to rule now. I am going to grant the motion in a limited fashion. I do think the requests are overly broad but I think that there's no basis not to grant discovery from the -- and I'll use the term generically -- the settlement noteholders. I think it is relevant to the confirmation hearing that I will be holding. It relates to both the interest issue and the valuation issue.

On the timing, I will require that the documents and information -- or discovery be responded to within two weeks. That was the basis on which I agreed to have the hearing today and the parties have been aware that if I granted it, it would be on that time frame.

I will limit the discovery, though, to what I think is relevant. I think what is relevant is any post-bankruptcy

trading by these parties. Rule 2019 would require it anyway. And I think that it is relevant to the issues raised and identified by the Court as of concern in my opinion denying confirmation.

I will require the production of any information received by these parties, the settlement noteholders, during settlement negotiations. That limits it temporally as well. I will require the production of any information with respect to their valuation of the reorganized debtor. It may not be a value the debtor -- the Court agrees is the value of the reorganized debtor but I think it is relevant to that issue. I will not limit it to specific trades identified by Mr. Thoma or anybody else. I think all trades post-petition should be produced. But I will not allow the broad ranging inquiries into what the settlement noteholders' plans are as to the -- for the reorganized debtor. I don't think that's relevant to any confirmation issue.

Do I have to go through each interrogatory and -- I think on one issue with respect to admissions, they can submit whatever admissions they want. That's appropriate. You can respond to them if you agree or don't agree. But again, they should be limited to the areas that I have identified.

MR. HARRIS: Your Honor?

THE COURT: Yes.

MR. HARRIS: If I may, by way of clarification? When

Your Honor said that we'd limit it to information received by the parties during settlement negotiations and that would be a temporal limitation, is that a temporal limitation with respect to your statement regarding post-bankruptcy trades so that the temporal limitation would be any trading from and after the point you first received material nonpublic information? Or is it --

THE COURT: No.

MR. HARRIS: I didn't understand the comment regarding to the temporal limitation and how it related to the comment about all post-bankruptcy trading.

THE COURT: Post-bankruptcy trading should be produced. Information regarding settlement negotiations is, obviously, only since you got involved in settlement negotiations.

MR. HARRIS: And, Your Honor, would you like us to produce the details of the actual settlement negotiations or the information we received from the company during the settlement negotiations?

THE COURT: Only the information received during the settlement negotiations. The settlement negotiations themselves I don't think are relevant.

MR. HARRIS: Okay. Thank you for that clarification.

THE COURT: Yes. Thank you for asking.

MR. MAYER: Your Honor, I appreciate your limiting the

scope of discovery. I suspect there will be some further negotiations on meet and confer. And we'll do what we can. But if we determine that we simply can't do it then I'll have to come back either to you or seek relief elsewhere. Two weeks is a commitment that was not made by my client. And there may be a lot of documents to review. And if it can't be done then we'll come back and tell you or, if necessary, we'll have to tell some other judge that it can't be done because if it can't be done, it can't be done.

THE COURT: All right. I'll be available for a teleconference if the parties wish.

MR. ARD: One other point of clarification, Your Honor. I didn't hear you say anything about the ethical trading wall.

THE COURT: Oh, I'm sorry.

MR. ARD: Yeah.

THE COURT: Thank you. Yes. I will require information regarding what process was put in place by these parties if any regarding the post-bankruptcy trading.

MR. ARD: I'm sorry, Your Honor. One more point. You said that you may go to the interrogatories but you don't need to. But they're to respond to the interrogatories as well insofar as they pertain to the questions that you --

THE COURT: To those topics, yes.

MR. ARD: To the issues. Thank you, Your Honor.

# EXHIBIT C

x 2

# Washington Mutual, Inc.

March 9, 2009

VIA E-MAIL

To Aurelius Capital Management, LP
535 Madison Avenue, 22nd Floor
New York, NY 10022

Re: **Confidentiality Agreement (Limited) with Aurelius Capital Management, LP**

Washington Mutual, Inc. and WMI Investment Corp (collectively, the "Debtors") are debtors and debtors in possession in the jointly administered chapter 11 cases pending in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court"), Case No. 08-12229 (MFW) (collectively, the "Cases"). The Debtors are prepared to provide now and during the administration of the Cases to Aurelius Capital Management, LP ("Participant") certain information relating to the Debtors and other matters relevant to the Cases. The Debtors are entering into this agreement (the "Agreement") with Participant to govern the exchange and preservation of that information. The term "Representative" as used in this Agreement shall include directors, executives, officers, employees, members, managers, agents, partners, experts, consultants, legal counsel, affiliates and financial and other advisors.

As used herein, the term "Confidential Information" shall mean any information (i) whether written or oral and whether prepared by the Debtors, their Representatives, or otherwise and irrespective of the form of communication, (ii) concerning the Debtors and reasonably related to and necessary for the limited purpose of Participant's participation in negotiations among the Debtors, the Federal Deposit Insurance Corporation (in its individual capacity and in its capacity as receiver of Washington Mutual Bank) JPMorgan Chase & Co. (and/or its affiliates and subsidiaries) concerning the terms of a plan (as that term is used in subchapter II of chapter 11 of title 11, United States Code), (iii) that is furnished during the pendency of the Cases (whether on or after the date hereof) to Participant by, or on behalf of, the Debtors or their Representatives, and (iv) that is confidential, non-public or proprietary in nature. "Confidential Information" shall also include all notes, analyses, compilations, studies or other documents, whether prepared by Participant or others, which contain or are based upon Confidential Information furnished to Participant concerning the Debtors. The term "Confidential Information" shall not include information that (i) was in Participant's or its Representatives' possession prior to receiving such information from the Debtors so long as such information did not come from a source that is not reasonably known by the Participant or its Representatives to be bound by a confidentiality agreement with, or

other legal, contractual, or fiduciary obligation of confidentiality owed to, the Debtors, (ii) is publicly available, or becomes publicly available other than as a result of a disclosure by Participant in violation of the terms hereof, (iii) is or becomes available to Participant on a non-confidential basis from a source other than the Debtors or any of their Representatives, so long as such source is not known by Participant to be bound by a confidentiality agreement with, or legal, contractual or fiduciary obligation of confidentiality to, the Debtors and in breach of such obligation, or (iv) is independently acquired or developed by Participant not in violation of this Agreement.

In consideration of such Confidential Information being furnished by the Debtors to Participant, Participant agrees to the following:

1. Participant hereby agrees that all Confidential Information and the existence thereof will be held and treated in confidence, and will not be disclosed in any manner whatsoever, in whole or in part, to any party, except as provided herein; provided, however, that information concerning the existence of Confidential Information shall be subject to the exception to non-disclosure set forth above under sub-paragraph (ii) as if it were Confidential Information for the purposes hereof. Participant agrees to use Confidential Information only for the purpose of participating in the Cases and further agrees not to use Confidential Information in any manner inconsistent with this Agreement. Nothing in this Agreement shall prejudice Participant's ability to obtain Confidential Information by way of discovery or other legal manner.

Participant may share Confidential Information: (a) with its directors, executives, officers and employees who require such information and who agree to keep such Confidential Information in accordance with the terms of this Agreement, (b) with its other Representatives, and (c) with any other party that has executed a confidentiality agreement with Debtors in form and substance that is no less favorable to such party than the terms of this Agreement. Participant will be responsible for any breach of the non-disclosure provisions of this Agreement by it or its Representatives.

2. The Debtors acknowledge and are aware that Participant may maintain or establish an information blocking device or "Ethical Wall" between its employees who receive the Confidential Information and its other employees. The Debtors acknowledge and are aware and Participant agrees that in the event it maintains or establishes such an information blocking device or Ethical Wall, only those employees who receive Confidential Information or otherwise participate in discussions with the Debtors or their Representatives with respect to the transaction contemplated hereunder (such designated employees, the "Designated Representatives") shall be bound by the restrictions contained herein. In order to preserve such Ethical Wall, if established (and without limiting the generality of the other provisions of this Agreement), the Debtors and Participant each agree that the Designated Representatives each shall not disclose Confidential Information, or otherwise discuss the Cases in a manner that may intentionally or inadvertently divulge Confidential Information, to any employee, officer, or director of Participant or Participant's affiliates who is not a Designated Representative. Attached hereto as Exhibit A is a description of procedures and

mechanisms that Participant shall establish or maintain and enforce to create and preserve an effective Ethical Wall. Notwithstanding anything in this Agreement to the contrary, (a) only those individuals employed by Participant who are working on the proposed transaction contemplated hereunder and, after the date hereof, have gained knowledge of the substantive Confidential Information provided under this Agreement shall be bound by the restrictions contained herein, (b) and for the avoidance of doubt, neither Participant nor its affiliates shall be restricted from acting with respect to or pursuing any transaction regarding the Debtors and/or their respective securities, bank debt or other instruments.

3. In the event that Participant receives a request or requirement to disclose any Confidential Information, in any such case under any applicable law or regulation, subpoena, court order, or legal, regulatory, or judicial process or the rules of any applicable regulatory agency or stock exchange (collectively, "Legal Process"), Participant agrees, if legally permitted, (i) to promptly notify the Debtors in writing thereof in order to enable the Debtors, at the Debtors' sole cost and expense, to seek an appropriate protective order or other remedy or to waive compliance, in whole or in part, with the terms of this Agreement, and (ii) if disclosure is legally required or requested, the Participant shall use its reasonable efforts, at the Debtors' sole cost and expense, to cooperate with the Debtors, at the Debtors' expense, in any attempt they may make to obtain a protective order or other appropriate remedy and/or waive compliance, in whole or in part, with the terms of this Agreement. In the event that such protective order or other remedy is not obtained, or that the Debtors waive compliance with the provisions hereof, Participant shall be permitted to furnish that portion of the Confidential Information as they are advised by counsel is legally required pursuant to such Legal Process. Participant shall not oppose the Debtors' efforts to obtain reliable assurance that confidential treatment will be accorded such Confidential Information.

4. Participant understands and acknowledges that the Debtors make no representation or warranty as to the accuracy or completeness of the Confidential Information, and Participant agrees that neither the Debtors nor any of their Representatives will have any liability to Participant or its Representatives relating to or resulting from the use of the Confidential Information.

5. Participant shall promptly, upon the Debtors' written request and at the option of Participant, return to the Debtors or destroy, if so requested by the Debtors in writing, all Confidential Information in its possession and will not retain any copies, extracts or other reproductions in whole or in part of such written material (i) unless Participant is prohibited from doing so by any applicable law, rule, regulation code of ethics or by a competent judicial, governmental supervisory or regulatory body, or (ii) except such Confidential Information as may be stored on magnetic backup discs as part of Participant's standard archiving process. In the event Participant withdraws from further participation in the Cases prior to termination of this Agreement, Confidential Information shall be held by Participant subject to the terms of the Agreement (and notwithstanding Participant's withdrawal) unless otherwise (i) agreed by the parties hereto, (ii) ordered by the Bankruptcy Court, (iii) required by law, or (iv) requested to be

destroyed by the Debtors. Unless otherwise directed by the Debtors, Participant may retain one copy of any Confidential Information it receives for its office records subject to the confidentiality of such copy as provided under the terms of this Agreement.

6. The Debtors are entitled to seek all remedies that may be available to any of them at law or in equity for any breach or violation of this Agreement by Participant, including specific performance and injunctive relief and, in the event the Debtors seek such relief, Participant shall not oppose same on the grounds that the Debtors are not entitled to seek such relief. Participant further agrees to waive, and to use its reasonable best efforts to cause its officers, employees, and agents to waive, any requirement for the securing or posting of any bond in connection with such remedy.

Participant shall be liable for any breach of this Agreement as may be determined by a final non-appealable order of a court of competent jurisdiction. Nothing in this section 6 shall prevent Participant from contesting that any such breach has occurred or from contesting any litigation in any appropriate fashion.

7. It is understood and agreed that no failure or delay by a party hereto in exercising any right, power or privilege hereunder shall operate as a waiver thereof, nor shall any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any right, power or privilege hereunder.

8. The invalidity or unenforceability of any provision of this Agreement shall not affect the validity or enforceability of any other provisions of this Agreement, which shall remain in full force and effect.

9. This Agreement constitutes the entire agreement and understanding of the parties hereto with respect to the subject matter hereof and supersedes any and all prior agreements, arrangements and understandings relating to the matter provided for herein. No alteration, waiver, amendment, change or supplement hereto shall be binding or effective unless the same is set forth in a writing signed by each party hereto. No party hereunder may assign its rights or obligations under this Agreement without the prior written consent of the other party

10. Nothing in this Agreement is intended to grant Participant any rights under any patent, copyright, trade secret or other intellectual property right, nor shall this Agreement grant to Participant any rights in or to the Confidential Information, except the limited right to review the Confidential Information solely for the purpose and in the manner set forth in this Agreement.

11. This Agreement shall be governed by, and construed in accordance with, the laws of the State of New York, without regard to its conflict of laws principles. Each party hereby irrevocably and unconditionally consents to submit to the exclusive jurisdiction of the Bankruptcy Court for any actions, suits or proceedings arising out of or relating to this Agreement (and the parties agree not to commence any action, suit or proceeding relating thereto except in such court), and further agrees that service of any

process, summons, notice or document by U.S. registered mail to the respective addresses of and to the attention of the (i) Debtors' counsel and (ii) Participant's General Counsel shall be effective service of process for any action, suit or proceeding brought against the parties in any such court. Each party hereby irrevocably and unconditionally waives any objection to the laying of venue of any action, suit or proceeding arising out of this agreement in the Bankruptcy Court, and hereby further irrevocably and unconditionally waives and agrees not to plead or claim in any such court that any such action, suit or proceeding brought in any such court has been brought in an inconvenient forum.

12. In the event that Participant intends to offer into evidence or otherwise use Confidential Information in the Cases, then Participant shall (i) obtain the prior written consent of the Debtors (through the Debtors' counsel) to such offer or use; or (ii) obtain an order of the Bankruptcy Court to use such Confidential Information pursuant to the Federal Rules of Bankruptcy Procedure, including by seeking authorization to file the papers seeking such order under seal. Any such request for relief from the Bankruptcy Court may be heard on expedited notice, subject to the Bankruptcy Court's calendar.

13. Other than any provision hereof that by its terms survives termination, this Agreement shall remain in full force and effect until the earlier to occur of (i) the filing by the Debtors of a disclosure statement pursuant to section 1125(b) of title 11, United States Code, (ii) sixty days following the date of execution of this Agreement, and (iii) the termination of this Agreement by agreement of the parties hereto. Upon the termination of this Agreement pursuant hereto, the Debtors shall make public disclosure (within the meaning of Rule 101 of Regulation FD) of a fair summary, as reasonably determined by the Debtors, of any Confidential Information that constitutes material non-public information under U.S. federal securities laws. Such disclosure shall be made in the Debtor's next regularly scheduled monthly operating report immediately following such termination unless timing constraints make it impracticable, in which case the Debtors shall make such disclosure as soon as is reasonably practicable, but in no event later than 10 days following termination of this Agreement.

14. This Agreement may be executed in separate counterparts, each of which shall be deemed an original, and all of which taken together shall constitute one and the same instrument.

[THE REMAINDER OF THIS PAGE IS INTENTIONALLY LEFT BLANK]

If the foregoing reflects our agreement, please execute below and return to my attention.

Very truly yours,

Washington Mutual, Inc.

Signature: _____

Name/Title: Chad Smith / General Counsel

WMI Investment Corp

Signature: _____

Name/Title: Chad Smith / Senior Vice President and Secretary

**AGREED TO AND ACCEPTED BY:**

**AURELIUS CAPITAL MANAGEMENT, LP**

Signature: _____

Name/Title: Dave Lemper / Managing Director

# EXHIBIT D

**UNITED STATES BANKRUPTCY COURT**
**DISTRICT OF DELAWARE**

**In re Washington Mutual, Inc., et al.**

**Case No. 08-12229 (MFW)**
**Reporting Period: 03-01-09 to 03-31-09**

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| Copies of bank statements | MOR-1c | Refer to attached stmt | |
| Cash disbursements journals | | n/a | Refer to MOR 1 for summary of all disbursements. |
| Statement of Operations | MOR-2 | Yes | See attached notes |
| Balance Sheet | MOR-3 | Yes | See attached notes |
| Status of Postpetition Taxes | MOR-4 | Yes | |
| Copies of IRS Form 6123 or payment receipt | | n/a | Payroll services outsourced including remission of taxes |
| Copies of tax returns filed during reporting period | | n/a | See listing of filings |
| Summary of Unpaid Postpetition Debts | MOR-4 | n/a | Detail on face of balance sheet. |
| Listing of aged accounts payable | MOR-4 | Yes | |
| Accounts Receivable Reconciliation and Aging | MOR-5 | n/a | No trade receivables |
| Debtor Questionnaire | MOR-5 | Yes | |

I declare under penalty of perjury (28 U.S.C. Section 1746) that this report and the documents attached are true and correct to the best of my knowledge and belief.

/s/ John Maciel
Signature of Authorized Individual*

April 30, 2009
Date

John Maciel
Printed Name of Authorized Individual

Chief Financial Officer
Title of Authorized Individual

*Authorized individual must be an officer, director or shareholder if debtor is a corporation; a partner if debtor is a partnership; a manager or member if debtor is a limited liability company.

## Note 2: Restricted Cash and Cash Equivalents

WMI's restricted cash and cash equivalents of $113 million includes $57 million of accumulated dividends related to amounts held in escrow pertaining to and pending the resolution or determination of certain goodwill litigation. $53 million of such cash is contained in one of the Debtor's deposit accounts and is pledged as collateral to secure intercompany transactions between WMI and Washington Mutual Bank ("WMB"), and approximately $3 million of such cash is held as part of a Rabbi Trust.

## Note 3: Investment in Subsidiaries

WMI's investment in subsidiaries represents the book value of WMI's subsidiaries, including WMI Investment Corp. ("WMI Investment"). This balance does not represent the market value of these entities.

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## Note 5: Taxes

The tax asset and liability balances are recorded consistent with WMI's historical accounting practices as of the Petition Date and adjusted for refunds collected. Generally, tax related claims and payables are recorded on WMI's books and records on a consolidated basis with the other members of the consolidated tax group and have not been adjusted for any potential claims against these assets. The current recorded balances do not reflect all expected refunds or payments as these amounts are currently being reviewed. The current estimate for the total expected refunds, net of potential payments, is in the range of approximately $2.6 - $3.0 billion. WMI understands that JPMorgan, the purchaser of substantially all of WMB's assets, may seek to claim all or a portion of the expected tax refunds.

No provision or benefit from income taxes has been recorded as the NOL's are expected to be sufficient to offset income during the reported period.

## Note 6: Liabilities Subject to Compromise (Pre-Petition) – Payroll and benefit accruals

WMI's pre-petition payroll and benefit accruals include balances reflecting WMI's historic accounting policies related to pension accounting. Prior to the Petition Date, WMI recorded a $274 million liability in respect of such accruals and WMB recorded a $274 million asset, which amounts were netted out and eliminated on a consolidated basis. Neither balance was reported as an intercompany balance. WMI is analyzing these accounting entries and treatment within the context of its bankruptcy proceedings.

# EXHIBIT E

**From:** Uzzi, Gerard [guzzi@ny.whitecase.com]
**Sent:** Friday, May 08, 2009 4:44 PM
**To:** Dan Krueger
**Subject:** FW: Wamu

REDACTED

Gerard H. Uzzi
Partner
Financial Restructuring and Insolvency Practice
White & Case LLP
1155 Avenue of the Americas
New York, NY 10036-2787
Telephone: + 212-819-8479
Fax: + 212-354-8113
guzzi@whitecase.com

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**From:** brian.rosen@weil.com [mailto:brian.rosen@weil.com]
**Sent:** Thursday, May 07, 2009 3:00 PM
**To:** Uzzi, Gerard
**Subject:** Re: Wamu

No problem. The Debtors believe that all required disclosure has been made.

Also, thanks for yesterday and the tone of the meeting.

Brian

"Uzzi, Gerard" <guzzi@ny.whitecase.com>

05/07/2009 02:55 PM

To brian.rosen@weil.com
cc
Subject Wamu

Brian,

Thanks for yesterday's meeting. I think it will help us advance the case constructively. I wanted to follow up on one point relating to the expiration of the confidentiality agreement so that there is no confusion. I would like to confirm that, pursuant to the confidentiality agreements, the debtors believe that no further disclosure is required. You confirmation of this point is greatly appreciated. As you can appreciate it, this is an important point to the note holders.

Jerry

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This e-mail communication is confidential and is intended only for the individual(s) or entity named above and others who have been specifically authorized to receive it. If you are not the intended recipient, please do not read, copy, use or disclose the contents of this communication to others. Please notify the sender that you have received this e-mail in error by replying to the e-mail or by telephoning (212) 819-8200 during the hours of 9:30am - 5:30pm (EST). Any other time please call (212) 819-7664. Please then delete the e-mail and any copies of it. Thank you.
==========

# EXHIBIT F

November 16, 2009

**VIA E-MAIL**

To Aurelius Capital Management, LP for itself and on behalf of its managed fund entities

**Re: Confidentiality Agreement (Limited) with Aurelius Capital Management, LP for itself and on behalf of its managed fund entities**

Washington Mutual, Inc. and WMI Investment Corp. (collectively, the "Debtors") are debtors and debtors in possession in the jointly administered chapter 11 cases pending in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court"), Case No. 08-12229 (MFW) (collectively, the "Cases"). The Debtors are prepared to provide now and during the administration of the Cases to Aurelius Capital Management, LP for itself and on behalf of its managed fund entities ("Participant") certain information relating to the Debtors and other matters relevant to the Cases. The Debtors are entering into this agreement (the "Agreement") with Participant to govern the exchange and preservation of that information. The term "Representative" as used in this Agreement shall include directors, executives, officers, employees, members, managers, agents, partners, experts, consultants, legal counsel, affiliates and financial and other advisors.

As used herein, the term "Confidential Information" shall mean any information (i) whether written or oral and whether prepared by the Debtors, their Representatives, or otherwise and irrespective of the form of communication, (ii) concerning the Debtors and reasonably related to and necessary for the limited purpose of Participant's participation in negotiations among the Debtors, the Federal Deposit Insurance Corporation (in its individual corporate capacity and in its capacity as receiver of Washington Mutual Bank) (the "FDIC") and JPMorgan Chase & Co. (and/or its affiliates and subsidiaries, including JPMorgan Chase Bank, N.A.) (collectively, "JPM"), concerning the terms of a plan (as that term is used in subchapter II of chapter 11 of title 11, United States Code) and global settlement discussions regarding the resolution of pending litigation and claims between,

among other parties, the Debtors, the FDIC and JPM, including, without limitation, the following *JPMorgan Chase Bank, National Association, et al. v. Washington Mutual, Inc., et al., Case No. 09-50551 (MFW)*, *Washington Mutual, Inc., et al. v. JPMorgan Chase Bank, N.A., et al., Case No. 09-50934 (MFW)*, and *Washington Mutual, Inc., et al. v. Federal Deposit Insurance Corporation, Case No. 1:09-cv-0533 (RMC)*, (iii) that is furnished during the pendency of the Cases (whether on or after the date hereof) to Participant by, or on behalf of, the Debtors or their Representatives, and (iv) that is confidential, non-public or proprietary in nature. "Confidential Information" shall also include all notes, analyses, compilations, studies or other documents and materials, whether prepared by Participant or others, which contain or are based upon Confidential Information furnished to Participant concerning the Debtors. The term "Confidential Information" shall not include information that (i) was in Participant's or its Representatives' possession prior to receiving such information from the Debtors so long as such information did not come from a source that is not reasonably known by the Participant or its Representatives to be bound by a confidentiality agreement with, or other legal, contractual, or fiduciary obligation of confidentiality owed to, the Debtors, (ii) is publicly available, or becomes publicly available other than as a result of a disclosure by Participant in violation of the terms hereof, (iii) is or becomes available to Participant on a non-confidential basis from a source other than the Debtors or any of their Representatives, so long as such source is not known by Participant to be bound by a confidentiality agreement with, or a legal, contractual or fiduciary obligation of confidentiality to, the Debtors and in breach of such obligation, or (iv) is independently acquired or developed by Participant not in violation of this Agreement.

In consideration of such Confidential Information being furnished by the Debtors to Participant, Participant agrees to the following:

1. Participant hereby agrees that all Confidential Information and the existence thereof will be held and treated in confidence, and will not be disclosed in any manner whatsoever, in whole or in part, to any party, except as provided herein; provided, however, that information concerning the existence of Confidential Information shall be subject to the exception to non-disclosure set forth above under sub-paragraph (ii) as if it were Confidential Information for the purposes hereof. Participant agrees to use Confidential Information only for the purpose of participating in the Cases and further agrees not to use Confidential Information in any manner inconsistent with this Agreement. Nothing in this Agreement shall prejudice Participant's ability to obtain Confidential Information by way of discovery or other legal manner.

Participant may share Confidential Information: (a) with its directors, executives, officers and employees who require such information and who agree to keep such Confidential Information in accordance with the terms of this Agreement, (b) with its other Representatives, and (c) with any other party that has executed a confidentiality agreement with Debtors in form and substance that is no less favorable to such party than the terms of this Agreement. Participant will be responsible for any breach of the non-disclosure provisions of this Agreement by it or its Representatives.

2. The Debtors acknowledge and are aware that Participant may maintain or establish an information blocking device or "Ethical Wall" between its employees who receive the Confidential Information and its other employees. The Debtors acknowledge and are aware and Participant agrees that in the event it maintains or establishes such an information blocking device or Ethical Wall, only those employees who receive Confidential Information or otherwise participate in discussions with the Debtors or their Representatives with respect to the transaction contemplated hereunder (such designated employees, the "Designated Representatives") shall be bound by the restrictions contained herein. In order to preserve such Ethical Wall, if established (and without limiting the generality of the other provisions of this Agreement), the Debtors and Participant each agree that the Designated Representatives each shall not disclose Confidential Information, or otherwise discuss the Cases in a manner that may intentionally or inadvertently divulge Confidential Information, to any employee, officer, or director of Participant or Participant's affiliates who is not a Designated Representative. Attached hereto as Exhibit A is a description of procedures and mechanisms that Participant shall establish or maintain and enforce to create and preserve an effective Ethical Wall. Notwithstanding anything in this Agreement to the contrary, (a) only those individuals employed by Participant who are working on the proposed transaction contemplated hereunder and, after the date hereof, have gained knowledge of the substantive Confidential Information provided under this Agreement shall be bound by the restrictions contained herein, (b) and for the avoidance of doubt, neither Participant nor its affiliates shall be restricted from acting with respect to or pursuing any transaction regarding the Debtors and/or their respective securities, bank debt or other instruments.

3. In the event that Participant receives a request or requirement to disclose any Confidential Information, in any such case under any applicable law or regulation, subpoena, court order, or legal, regulatory, or judicial process or the rules of any applicable regulatory agency or stock exchange (collectively, "Legal Process"), Participant agrees, if legally permitted, (i) to promptly notify the Debtors in writing thereof in order to enable the Debtors, at the Debtors' sole cost and expense, to seek an appropriate protective order or other remedy or to waive compliance, in whole or in part, with the terms of this Agreement, and (ii) if disclosure is legally required or requested, the Participant shall use its reasonable efforts, at the Debtors' sole cost and expense, to cooperate with the Debtors, at the Debtors' expense, in any attempt they may make to obtain a protective order or other appropriate remedy and/or waive compliance, in whole or in part, with the terms of this Agreement. In the event that such protective order or other remedy is not obtained, or that the Debtors waive compliance with the provisions hereof, Participant shall be permitted to furnish that portion of the Confidential Information as they are advised by counsel is legally required pursuant to such Legal Process. Participant shall not oppose the Debtors' efforts to obtain reliable assurance that confidential treatment will be accorded such Confidential Information.

4. Participant understands and acknowledges that the Debtors make no representation or warranty as to the accuracy or completeness of the Confidential Information, and Participant agrees that neither the Debtors nor any of their Representatives will have any liability to Participant or its Representatives relating to or resulting from the use of the Confidential Information.

5. Participant shall promptly, upon the Debtors' written request and at the option of Participant, return to the Debtors or destroy, if so requested by the Debtors in writing, all Confidential Information in its possession and will not retain any copies, extracts or other reproductions in whole or in part of such written material (i) unless Participant is prohibited from doing so by any applicable law, rule, regulation code of ethics or by a competent judicial, governmental supervisory or regulatory body, or (ii) except such Confidential Information as may be stored on magnetic backup discs as part of Participant's standard archiving process. In the event Participant withdraws from further participation in the Cases prior to termination of this Agreement, Confidential Information shall be held by Participant subject to the terms of the Agreement (and notwithstanding Participant's withdrawal) unless otherwise (i) agreed by the parties hereto, (ii) ordered by the Bankruptcy Court, (iii) required by law, or (iv) requested to be destroyed by the Debtors. Unless otherwise directed by the Debtors, Participant may retain one copy of any Confidential Information it receives for its office records subject to the confidentiality of such copy as provided under the terms of this Agreement.

6. The Debtors are entitled to seek all remedies that may be available to any of them at law or in equity for any breach or violation of this Agreement by Participant, including specific performance and injunctive relief and, in the event the Debtors seek such relief, Participant shall not oppose same on the grounds that the Debtors are not entitled to seek such relief. Participant further agrees to waive, and to use its reasonable best efforts to cause its officers, employees, and agents to waive, any requirement for the securing or posting of any bond in connection with such remedy.

Participant shall be liable for any breach of this Agreement as may be determined by a final non-appealable order of a court of competent jurisdiction. Nothing in this section 6 shall prevent Participant from contesting that any such breach has occurred or from contesting any litigation in any appropriate fashion.

7. It is understood and agreed that no failure or delay by a party hereto in exercising any right, power or privilege hereunder shall operate as a waiver thereof, nor shall any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any right, power or privilege hereunder.

8. The invalidity or unenforceability of any provision of this Agreement shall not affect the validity or enforceability of any other provisions of this Agreement, which shall remain in full force and effect.

9. This Agreement constitutes the entire agreement and understanding of the parties hereto with respect to the subject matter hereof and supersedes any and all prior agreements, arrangements and understandings relating to the matter provided for herein. No alteration, waiver, amendment, change or supplement hereto shall be binding or effective unless the same is set forth in a writing signed by each party hereto. No party hereunder may assign its rights or obligations under this Agreement without the prior written consent of the other party.

10. Nothing in this Agreement is intended to grant Participant any rights under any patent, copyright, trade secret or other intellectual property right, nor shall this Agreement grant to Participant any rights in or to the Confidential Information, except the limited right to review the Confidential Information solely for the purpose and in the manner set forth in this Agreement.

11. This Agreement shall be governed by, and construed in accordance with, the laws of the State of New York, without regard to its conflict of laws principles. Each party hereby irrevocably and unconditionally consents to submit to the exclusive jurisdiction of the Bankruptcy Court for any actions, suits or proceedings arising out of or relating to this Agreement (and the parties agree not to commence any action, suit or proceeding relating thereto except in such court), and further agrees that service of any process, summons, notice or document by U.S. registered mail to the respective addresses of and to the attention of the (i) Debtors' counsel and (ii) Participant's General Counsel shall be effective service of process for any action, suit or proceeding brought against the parties in any such court. Each party hereby irrevocably and unconditionally waives any objection to the laying of venue of any action, suit or proceeding arising out of this agreement in the Bankruptcy Court, and hereby further irrevocably and unconditionally waives and agrees not to plead or claim in any such court that any such action, suit or proceeding brought in any such court has been brought in an inconvenient forum.

12. In the event that Participant intends to offer into evidence or otherwise use Confidential Information in the Cases, then Participant shall (i) obtain the prior written consent of the Debtors (through the Debtors' counsel) to such offer or use; or (ii) obtain an order of the Bankruptcy Court to use such Confidential Information pursuant to the Federal Rules of Bankruptcy Procedure, including by seeking authorization to file the papers seeking such order under seal. Any such request for relief from the Bankruptcy Court may be heard on expedited notice, subject to the Bankruptcy Court's calendar.

13. Other than any provision hereof that by its terms survives termination, this Agreement shall remain in full force and effect until the earlier to occur of (i) the filing by the Debtors of a disclosure statement pursuant to section 1125(b) of title 11, United States Code, (ii) December 31, 2009, and (iii) the termination of this Agreement by agreement of the parties hereto. Upon the termination of this Agreement pursuant hereto, the Debtors shall immediately make public disclosure (within the meaning of Rule 101 of Regulation FD) of a fair summary, as reasonably determined by

the Debtors, of any Confidential Information that constitutes material non-public information under U.S. federal securities laws. In addition, if the Debtors, the FDIC and JPM enter into a final agreement that involves a global settlement of pending litigation and claims between, among other parties, the Debtors, the FDIC and JPM, including, without limitation, the following *JPMorgan Chase Bank, National Association, et al. v. Washington Mutual, Inc., et al., Case No. 09-50551 (MFW)*, *Washington Mutual, Inc., et al. v. JPMorgan Chase Bank, N.A., et al., Case No. 09-50934 (MFW)*, and *Washington Mutual, Inc., et al. v. Federal Deposit Insurance Corporation, Case No. 1:09-cv-0533 (RMC)*, the Debtors shall, within four (4) business days, make public disclosure (within the meaning of Rule 101 of Regulation FD) of a fair summary, as reasonably determined by the Debtors, of any Confidential Information that constitutes material non-public information under U.S. federal securities laws.

14. This Agreement may be executed in separate counterparts, each of which shall be deemed an original, and all of which taken together shall constitute one and the same instrument.

[THE REMAINDER OF THIS PAGE IS INTENTIONALLY LEFT BLANK]

If the foregoing reflects our agreement, please execute below and return to my attention.

Very truly yours,

Washington Mutual, Inc.

Signature: _____

Name/Title: Charles Edward Smith / EVP

WMI Investment Corp.

Signature: _____

Name/Title: Charles Edward Smith / EVP

**AGREED TO AND ACCEPTED BY:**

**Aurelius Capital Management, L.P., ~~on behalf of certain funds for which it acts as investment adviser~~** for itself and on behalf of its managed fund entities

Signature: _____

Name/Title: Dan Cooper
Managing Director

# EXHIBIT G

From: Roose, Matthew
Sent: Mon 12/28/2009 9:19 PM (GMT 0)
To: WaMu – Aurelius
Cc: de Leeuw, Michael; Groskaufmanis, Karl A.
Bcc:
Subject: FW: WMI - MOR

REDACTED

**From:** Rosen, Brian [mailto:brian.rosen@weil.com]
**Sent:** Monday, December 28, 2009 4:06 PM
**To:** Roose, Matthew
**Cc:** 'bkosturos@alvarezandmarsal.com'; Chad Smith; 'Jon Goulding'; 'jmaciel@alvarezandmarsal.com'; Sapeika, Tal; Rodden, Kelly; Curro, Matthew; Scheler, Brad Eric
**Subject:** RE: WMI - MOR

Matt,

I have spoken to folks at WMI/A&&M. We will be filing the MOR on Wednesday at some point. At that time, WMI will consider all necessary disclosure obligations to have been satisfied and the Confidentiality Agreement may be deemed terminated. Inasmuch as we will not be seeking comments and suggestions to the MOR, WMI believes it would be inappropriate for an advanced review of the MOR by your clients.

Brian

Brian S. Rosen

Weil, Gotshal && Manges LLP

767 Fifth Avenue

New York, NY 10153

Phone: (212) 310-8602

Fax: (212) 310-8353

Email: brian.rosen@weil.com

# EXHIBIT H

UNITED STATES BANKRUPTCY COURT

DISTRICT OF DELAWARE

Case No. 08-12229 (MFW); Adv. Case No. 09-50934

- - - - - - - - - - - - - - - - - - - - - -x

In the Matter of:

WASHINGTON MUTUAL, INC., et al.,

Debtors.

- - - - - - - - - - - - - - - - - - - - - -x

WASHINGTON MUTUAL, INC. and

WMI INVESTMENT CORP.,

Plaintiffs,

-against-

JP MORGAN CHASE BANK, NATIONAL ASSOCIATION,

Defendant.

- - - - - - - - - - - - - - - - - - - - - -x

U.S. Bankruptcy Court

824 North Market Street

Wilmington, Delaware

March 12, 2010

12:25 PM

B E F O R E:

HON. MARY F. WALRATH

U.S. BANKRUPTCY JUDGE

ECR OPERATOR: BRANDON MCCARTHY

also refer to as a second refund. With respect to the first refund, that will be split seventy percent to JPMorgan Chase, thirty percent to WMI. With respect to the second refund, that will be split 59.6 percent to the FDIC or such other parties as the FDIC should tell us, and we are working out those mechanics, and 40.4 percent of that second refund will go to WMI.

With respect to the WMI medical plan, JPMC will assume all liabilities associated with the medical plan, including OPEB liabilities, and WMI will sign over to JPMorgan Chase rebate checks, associated with a post-petition period, that we have not cashed. To the extent that WMI has cashed those, however, WMI will pay to JPMorgan the amount of money that was included in those rebate checks that were cashed.

With respect to rabbi trusts and BOLI/COLI policies, Your Honor, the parties have agreed to split based upon what the representative ownership was between WMI and WMB, with the WMB assets going to JPMorgan Chase with an assumption of liabilities associated with that.

With respect to the qualified pension plan, WMI will transfer the sponsorship of that plan to JPMorgan Chase, and JPMorgan Chase will assume the liabilities associated with that plan.

There is one piece of litigation that is outstanding with respect to that plan, Your Honor, and the debtors can

announce that we have resolved that litigation, subject to documentation. And that of course, Your Honor, is a most -- and that is also before the Court; that has been adjourned from time to time. It's been referred to as the Busse (ph.) litigation. And we are happy to announce that that litigation is resolved.

With respect to something referred to as ATIS (ph.) Loan Corp., JPM will transfer its ownership percentage in that to WMI.

With respect to goodwill litigation, there are two litigations, Your Honor, one the Court remembers; it was the American Savings litigation and it was the subject of a motion with respect to the IRS, and we deposited approximately fifty-five million dollars into the registry of the Court. JPMorgan has agreed as part of this transaction that the debtors will have full ownership of the American Savings litigation for future damages that may come from that ongoing litigation. And with respect to the fifty-five million that is in the registry of the Court, that will be turned over to the debtors' estates.

With respect to the litigation that's referred to as the Anchor Savings goodwill Litigation, that will be turned over to JPM, and the debtors will convey all of their interest in that litigation to JPMorgan.

With respect to vendor claims, JPMorgan will waive any claims that it has against the estate for the payment of any

pre-petition vendor payables. And JPMorgan has agreed to pay any remaining pre-petition vendor payables in an amount not to exceed fifty million dollars.

With respect to the Visa shares, JPMorgan shall purchase the Visa shares from the debtors for fifty million dollars. The debtors will retain any dividends that they have already received with respect to those Visa shares up to the date of the effectiveness of a plan.

With respect to Winpower, the debtors have agreed to transfer ownership of Winpower to JPMorgan Chase.

With respect to intercompany issues, JPMorgan shall repay the four intercompany loans to Washington Mutual, including interest, which as of, I believe, January of this year was in the approximate amount of 179 million dollars, and that all other intercompany claims shall be forgiven.

As to intellectual property, WMI shall transfer certain intellectual property to JPMorgan Chase, excluding, however, certain domain names, including those associated with TIMCOR and 1031 Exchange.

With respect to loan servicing, there are a few agreements outstanding, and JPMorgan will continue to service these loans for the benefit of the WMI estate.

As to something referred to as BKK litigation, which there are approximately seven claims against the estate, Your Honor, JPMorgan shall assume all liability associated with that

litigation and not assert claims back against WMI.

As to surety bonds, JPMorgan shall take over the surety bond program with Safeco and certain other bonding companies and assume the liability with that.

As to releases, the debtors, the FDIC in its capacity as receiver and as corporate capacity, shall exchange mutual releases, subject to certain indemnity obligations that I'll get to in a moment.

Litigations shall be dismissed and proofs of claim withdrawn with prejudice, among the parties.

With respect to something called the Texas litigation, Your Honor, or now it's maybe referred to as the ANICO/Washington D.C. litigation, the parties will do their best to establish that whatever claims remain in that litigation are property of the estate, they're derivative in nature, and seek to use their reasonable best efforts to have that litigation dismissed with prejudice.

With respect to -- Your Honor, I talked about the tax refund earlier, and I just want to be clear so that there's no confusion, and I know a lot of people follow what's going on in Court today. The debtors, JPMorgan, we estimate that the second refund is in the approximate amount of 2.6 billion dollars and that it will be split, as I said before Your Honor, 59.6 and 40.4. JPMorgan will not receive any portion of this refund.

## CERTIFICATE OF SERVICE

I, Victoria Guilfoyle, hereby certify that on June 28, 2011, I caused a copy of the following document to be served upon the parties listed on the attached service list in the manner indicated.

**AURELIUS CAPITAL MANAGEMENT, LP'S OBJECTION TO MOTION OF THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS FOR AN ORDER COMPELLING PRODUCTION OF DOCUMENTS**

Dated: June 28, 2011

*/s/ Victoria Guilfoyle*
Victoria Guilfoyle (DE No. 5183)

**Service List**

Via Electronic Mail, Hand Delivery (local) and First Class Mail (non-local)

William P. Bowden, Esquire
Gregory A. Taylor, Esquire
Ashby & Geddes, P. A.
500 Delaware Ave., 8th Floor
P.O. Box 1150
Wilmington, DE 19899
wbowden@ashby-geddes.com
gtaylor@ashby-geddes.com

Mark D. Collins, Esquire
Chun I. Jang, Esquire
Richards, Layton & Finger, P.A.
One Rodney Square
920 North King Street
Wilmington, DE 19801
collins@rlf.com
jang@rlf.com

Stephen D. Susman, Esquire
Seth D. Ard, Esquire
Susman Godfrey, L.L.P.
654 Madison Avenue, 5th Floor
New York, NY 10065
ssusman@susmangodfrey.com
sard@susmangodfrey.com

David B. Stratton, Esquire
Pepper Hamilton LLP
Hercules Plaza Ste. 5100
1313 N. Market Street
Wilmington, DE 19801
strattond@pepperlaw.com

William D. Sullivan, Esquire
Elihu E. Allinson, III, Esquire
Sullivan Hazeltine Allinson LLC
901 North Market Street, Suite 1300
Wilmington, DE 19801
bsullivan@sha-llc.com
zallinson@sha-llc.com

Parker C. Folse, III, Esquire
Edgar Sargent, Esquire
Justin A. Nelson, Esquire
Susman Godfrey, L.L.P.
1201 Third Ave., Suite 3800
Seattle, WA 98101
pfolse@susmangodfrey.com
esargent@susmangodfrey.com
jnelson@susmangodfrey.com

Brian S. Rosen, Esquire
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153
brian.rosen@weil.com

Robert A. Johnson, Esquire
Fred S. Hodara, Esquire
Akin Gump Strauss Hauer & Feld LLP
One Bryant Park
New York, NY 10036
fhodara@akingump.com
rajohnson@akingump.com